

**RAJ VAKHARIA,**  
*Appellant,*

v.

**Secretary, DEPARTMENT OF  
NATURAL RESOURCES, and  
Secretary, DEPARTMENT OF  
EMPLOYMENT RELATIONS,**  
*Respondents.*

INTERIM DECISION  
AND ORDER

Case No. 95-0178-PC

This is an appeal pursuant to §230.44(1)(b), Stats., of the denial of a request for reclassification<sup>1</sup> from Air Management Engineer-Advanced 1 to Air Management Engineer-Advanced 2 (hereafter referred to simply as Advanced 1 and Advanced 2).

Appellant's position is in the New Source Review Unit, Permit Section, Bureau of Air Management, Division of Environmental Quality, Department of Natural Resources (DNR). The position description (PD) (Appellant's Exhibit 3) for appellant's position includes the following position summary, goals and percentages:

Independently evaluates complex permit applications to construct and/or operate new and existing direct sources. Develops guidance document on how to review air pollution control techniques and equipment. Serves as the program's technical expert for all source categories in woodworking plants and wood finishing operations. Develops policy, sets standards, establishes procedures and provides professional engineering consulting services to Bureau and District staff relating to woodworking plants and wood finishing operations.

Provides technical assistance to air program staff, industry representatives and consultants to clarify department's regulations and policies, regarding emission limits and pollution control processes and technology. Writes RACT rules for lime manufacturing and glass manufacturing facilities.

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<sup>1</sup> This sentence was amended for clarification.

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45% A. Independent evaluation of air permit applications and supporting materials for complex, Prevention of Significant Deterioration or PSD, nonattainment area major sources, and minor air pollution sources on a statewide basis.

. . . . .

25% B. Function as the program's chief technical consultant on the woodworking and wood finishing facilities.

. . . . .

10% C. Function as the Department's chief technical consultant on control strategies for sulfur dioxide emissions from new or modified combustion sources and for emissions from incinerators.

10% D. Provides technical assistance, develop guidelines, policies, rules and regulation for controlling Nox emissions from glass manufacturing plants and lime manufacturing plants.

. . . . .

2% E. Perform an engineering evaluation to determine the appropriate add-on control equipment or process changes to minimize the emissions of ethylene oxide from sterilizers.

. . . . .

2% F. Witness testing of sources and attest to adequacy of test methods and source operation during test. Testing may be stack emission tests for fly ash, sulfur dioxide, carbon monoxide, or any other pollutants. Tests may include monitoring of operation and pollution control equipment parameters such as temperature, flow rate, pressure drop, etc.

2% G. Review hazardous air contaminant compliance plans for accuracy and completeness. Perform BACT/LAER analysis and review compliance plan submittals for Tables 1, 2, and 4 and develop draft conditions for the Districts comment/approval. Issue compliance

approvals and administrative orders incorporating approval conditions for all reviews.

2% H. Review the work of the air program engineers and staff for accuracy and completeness.

2% I. Provide technical assistance to Districts and industry on departmental policies, rules, and regulations.

As compared to his previous PD dated July 2, 1990 (Appellant's Exhibit 2), the 1993 PD reflects some additional or expanded duties and responsibilities, including functioning as the "chief technical consultant for BACT/LAER, decisions for . . . woodworking and wood finishing facilities, metal can manufacturing, expanded styrene manufacturing facilities, foundries, glass manufacturing facilities and lime manufacturing facilities." 1993 PD, Activity A10 (Appellant's Exhibit A3). He also has a new goal D to "Provide technical assistance, develop guidelines, policies, rules and regulations for developing NOx emissions from glass manufacturing plants and lime manufacturing plants."

The Advanced 1 and 2 definitions are as follows:

Advanced 1

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 judgment 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 decisions have been made.

### Advanced 2

This is very difficult, complex professional air management engineer work. Employes 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. Employes 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. Employes at this level function as the chief technical consultant. Employes at this level are delegated authority to make the final engineering decision.

Respondent DNR reached the conclusion on a delegated basis<sup>2</sup> that appellant's position was more appropriately classified at the Advanced 1 level. Since respondents did conclude that some of the duties and responsibilities of appellant's position were at the Advanced 2 level, but that the Advanced 2 job content did not constitute a majority, this discussion will be oriented around respondent's positions on the various Advanced 2 criteria. That the discussion may lack reference to certain factors deemed essential at the Advanced 2 level per prior Commission decisions (see, for example, the discussion in *Harder v. DNR & DER*, 95-0181-PC, 8/5/96) merely reflects that the issue was not contested, rather than as a departure from prior decisions.<sup>3</sup>

The Advanced 2 definition includes the requirement that "[e]mployes in this class continually perform the most complex engineering reviews for the assigned area." Respondents take the position that a majority of appellant's engineering review work doesn't fall into the most complex category. Respondent's basis for this position is primarily twofold—first, that only a few of the activities on appellant's PD (Appellant's Exhibit 3) constitute "most complex" work—i.e., A3, B2 and C2; and second, that all the engineers in appellant's section (who are all in Advanced 1 positions) have similar worker activities, and the "very difficult, complex" reviews are split up among them.

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<sup>2</sup> §230.04(1m), Stats DER did, however, concur in this conclusion.

The record does not support the first basis for respondent's position. Appellant testified convincingly, and without contradiction in this record, that the worker activities on his PD involving engineering review are steps from beginning to end in an engineering process and these activities cannot be divided into engineering and non-engineering tasks. For example, in response to respondent's contention that activity A1 ("conduct pre-application meetings and correspond with potential permit applicants to discuss state and federal air pollution control requirements.") did not involve engineering *per se*, appellant explained that this activity involves more than merely arranging meetings and exchanging names, and requires the substantive discussion of engineering issues.

Nor does the record support the second basis for respondent's position. Although the PD's for the Advanced 1 positions in appellant's unit utilize somewhat similar wording with respect to their permit review activities, this language itself does not address the positions' comparative levels of engineering complexity. Appellant presented expert testimony from his supervisors and other evidence that he is performing the most complex review work in the unit. Mr. Ziege (Chief of the Permit Section) testified that "at least" half of appellant's work under goal A falls into the "most complex" category. As respondent stated in its memo denying appellant's reclassification request (Appellant's Exhibit 10), other activities outside of goal A are associated with engineering review work. When combined with appellant's testimony and other evidence of record (see, e.g., breakdown of the reviews performed—Appellant's Exhibits 26-29), the record supports a finding that a majority of appellant's engineering review work is in the "most complex" area.

The Advanced 2 definition also includes this element: "[t]he work assigned is typically in uncharted areas with essentially no guidance to follow." Respondent contends that appellant fails to satisfy this criterion. However, appellant presented extensive expert testimony to support his assertion that he does. This was supported by the testimony of engineers in industry, his supervisors' testimony, and his own

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<sup>3</sup> This sentence was added to the final decision as clarification.

testimony. The DNR classification specialist stated in her analysis (Appellant's Exhibit 10) as follows:

Some of the work assignments may fall within the category of uncharted areas, however, some of the examples discussed during the position review (polystyrene and wood finishing), while guidance was not available within Wisconsin, guidance was available from other states. Additionally, projects mentioned during the review involving glass manufacturing and Hillshire Farms were performed in conjunction with other engineers and were not performed independently by this position.

However, appellant testified that he did not rely on guidance from other states with respect to his work assignments in these areas, and that there were no other engineers assigned to these projects. Appellant obviously is in the best position to know this information, and, taken as a whole, he has sustained his burden of proof as to this element.

The next Advanced 2 element is that "[e]mployees at this level typically provide direction to other engineers assigned to the project." Respondent's position on this criterion is set forth in its posthearing brief at page 7 as follows:

The record reflects that appellant, like his counterparts within the New Source Review Unit, may provide counsel and advice on areas within their specialty. However, this counsel is limited in scope and falls short of the standard of "typically." The team approach to permit issuance and peer review of engineering work further supports the conclusion that the appellant doesn't provide direction to other engineers for a majority of his duties.

However, the testimony of appellant and his supervisors establishes that his "direction to other engineers" goes beyond "peer review" and "counsel and advice" within his specialty areas. Dan Johnston, appellant's immediate supervisor, testified that because, for example, no one engineer (appellant) can do all the major PSD (Prevention of Significant Deterioration) or wood finishing reviews, some of this work is assigned to other engineers. However, these assignments are accompanied by instructions that they are to check with appellant before making any final decisions. In his areas of expertise, appellant is the arbiter of what is or is not acceptable.

Appellant's responsibilities in this area appear to satisfy the plain language requirement of this Advanced 2 criterion: "provide direction to other engineers assigned to the project." Furthermore, these responsibilities appear to fall within the ambit of the Commission's holding in *Harder v. DNR & DER*, 95-0181-PC, 8/5/96, page 3:

All engineers in the unit review each other's work to ensure the application of uniform standards. This is a peer-review task characterized as a team-work approach in the findings of fact (paragraph 12). The record does not indicate that any engineer reviewing another engineer's work product had the assigned authority to require the other engineer to change the work product<sup>4</sup> to conform with the reviewing engineer's opinions – a distinction which could be relevant to the Adv. 2 Class Spec requirement of "providing direction to other engineers assigned to the project." Without such authority, the peer review followed by all engineers could be characterized as consultation among peers, but not as providing direction to other engineers as required in the Class Spec. See, *Roushar v. DER*, 91-0069-PC, 2/21/92.

Clearly, appellant has the "authority to require the other engineer to change the work product to conform with the reviewing engineer's opinions."

A subsequent discussion of this area in *Harder* may at first blush seem contradictory to the above-quoted language from page three. Page 26 of the proposed decision includes the following discussion:

The Class Spec definition for the Advanced 2 level requires the employe to "typically provide direction to other engineers assigned to the project." Mr. Johnston signed Mr. Harder's Reclass PD as being accurate, including goal E which says Mr. Harder "[r]eview[s] the work of other engineers and staff." In cross examination Mr. Johnston revealed that all engineers his unit provide the same level of co-worker review as part of the unit's team process. Mr. Ziege also was questioned about duties performed by Mr. Harder under goal E of the Reclass PD. Mr. Ziege acknowledged he had been present during Mr. Johnston's testimony, but still attempted to distinguish Mr. Harder's duties from co-worker reviews performed by other engineers in the unit by saying Mr. Harder would have higher review responsibility in the areas of his expertise. Only upon further questioning did Mr. Ziege

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<sup>4</sup> This sentence was amended to add a previously-missing portion of the cited text.

acknowledge that the same would be true for the other engineers regarding their areas of expertise.

Reading this in the context of the discussion (quoted above) from page three, and other related language, the Commission concludes that this paragraph from page 26 (Proposed Decision) was not meant to imply that the Advanced 2 classification requires that the position in question be the only one in the work unit that provides direction to other engineers.<sup>5</sup> Rather, this paragraph should be considered as part of the position comparisons that were involved in the *Harder* decision. The subject paragraph was prefaced by the following sentence: “The examiner felt misled by some of the supervisors’ testimony which initially pictured certain activities as unique to Mr. Harder’s position, but which later were found to be the same or similar as tasks performed by coworkers classified<sup>6</sup> at the Advanced 1 level.” *Harder*, page 25 (PDO). Furthermore, the Commission commented on the part of the Proposed Decision that included this language as follows:

Mr. Harder also misunderstood the references in paragraphs 2-5 of the Discussion section to “unique” job duties. The references are to credibility impressions – not to legal standards adopted by the Commission. The stated credibility impression is that the examiner felt misled by the supervisors’ testimony in that the supervisors attempted to characterize Mr. Harder’s position as unique in certain aspects in which it was not. This observation is valid whether the Class Specs require “uniqueness” or not. *Harder* at page 4.

Finally, the Commission observed that it has not interpreted the Advanced 2 definition as requiring that an Advanced 2 position be unique and the only one doing the most complex work:

The legal analysis was further complicated because it appears DNR is using interpretations of the Advanced 2 Class Spec language which conflict with the Commission’s prior decisions. As noted in *Ostenson* (Decision and Order, p. 3-4), there are nine engineering positions at DHSS, all performing similar work, which DER classified at the Advanced 2 level. Accordingly, it is arguable whether the Commission

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<sup>5</sup> The Advanced 2 definition does not contain such a requirement

<sup>6</sup> This sentence was amended to add two words omitted from the cited text.



would agree with Ms. Steinmetz' interpretation of the Advanced 2 level as requiring a position to be so unique as to be the only position in the unit doing the most complex work. *Harder*, p. 27 (Proposed Decision) (footnote omitted).

Before leaving discussion of the *Harder* case, the Commission will address respondents' argument that it "should consider the findings and holding" in that case. While the Commission can consider to some extent the legal aspects of the *Harder* decision, such as its interpretation of the classification specifications, it cannot consider the findings in making its factual determinations here. Giving preclusive effect to the findings in *Harder* would not be appropriate because there has been no showing that appellant either was a party to that proceeding or in a position to have obtained judicial review of it. See, e.g., *Michelle T. v. Crozier*, 173 Wis. 2d 681, 495 N.W. 2d 327 (1993).

The final Advanced 2 criterion that appears to be in dispute is the requirement that the position be involved in the "development of policies, standards, procedure development, evaluation and administration." The record contains extensive evidence that appellant has performed this activity. Respondents contend in their posthearing brief that appellant's supervisor should be given the classification credit for the development of policies, standards, rules, etc., because his PD reflects this responsibility. Mr. Johnston testified that while he has general responsibility for this area, he does not have the specific technical expertise to be involved in "hands-on" rules and policies development activities, and he relies on appellant to do this. Since appellant does the actual development of rules, policies, and standards with little, if any, substantive input from his supervisors, he should receive classification credit for this work. This would be consistent with the testimony of respondents' classification specialist that, if the supervisor is merely signing off on rule drafts which have been prepared substantively by a subordinate, the subordinate should receive credit for the development of the rules. This result also is consistent with examples of other engineers who received such credit notwithstanding the fact that their supervisors had language in their PD's similar to that found in the PD's of appellant's supervisors.

Finally, some of appellant's rule development work was done completely outside the section (for Mr. Theiler, Director, Bureau of Air Management).

Respondent's classification specialist testified at hearing that at the time she had her discussion with appellant:

[T]here had not been any formalized procedures, administrative codes that had been done by his position. There was one . . . rule that he had been working on, but it had not gone through the process, it had just started through the approval process. So I did not find at that time that I did the review that there was any policies, procedures, standards being done specifically by this position.

However, this contention was not mentioned in either the denial memo (Appellant's Exhibit 10) or the posthearing brief, so it appears that respondent is not relying on it as part of its case. In any event, complainant testified, for example, that, during 1992 and 1993, approximately 20-25% of his time was involved in the development of rules which were promulgated in 1994-95. Since appellant was actively engaged in this process during this period, he should receive credit for classification purposes.

Comparisons were made to other Advanced 2 positions. The most probative position comparison is with respect to Mr. Hubbard's, since his position is in the same section as appellant's, and the nature of his work is the most similar. Respondent contends that Mr. Hubbard's position is broader in scope and responsibility. Mr. Hubbard's PD does reflect a higher percentage in consultation and rule and policy development, and less in permit review when compared to appellant's PD. For example, Mr. Hubbard's PD (Appellant's Exhibit 7) has a total of 60% in Goal A and B, "functioning as the department's chief expert on air pollution from combustion sources" and on "good combustion technology" for wood, 15% for Goal C, development of guidelines and procedures, and only 15% on Goal D, permit review work. Appellant's PD (Appellant's Exhibit 3) has a 45% Goal A for permit review, and 45% for consultation and rule, standard, and policy development (Goals B, C, and D). While the Commission agrees with respondents that Mr. Hubbard's PD is broader

in scope than appellant's, this is not dispositive with respect to the instant classification issue.

Respondents' denial of the Advanced 2 classification for appellant (Respondent's Exhibit 4), was not based on a WQES evaluation but rather on an analysis of appellant's duties and responsibilities against the Advanced 2 definition to determine whether it satisfied that definition. As discussed above, respondents determined that appellant's position did not satisfy the Advanced 2 criteria with respect to a majority of the positions' activities. While the bulk of appellant's activities involves permit review, respondents concluded that only about 10% (Activities A3, B2, and C2) constituted complex engineering reviews, and therefore appellant did not meet the Advanced 2 criterion of continually performing "the most complex engineering reviews for the assigned area." (Advanced 2 definition, Respondent's Exhibit 1). However, the evidence presented at the hearing established that respondents' conclusion rested on an overly narrow reading of his PD, and in fact he performed the majority of the most complex reviews handled by his unit, and that the majority of his engineering review work fell into the most complex category. The record evidence establishes that appellant's position also satisfies the other Advanced 2 criteria on which respondents relied to support the denial of the Advanced 2 classification, and that the majority of appellant's time is devoted to Advanced 2 level work. Therefore, that other positions at the Advanced 2 level are broader in scope, and may be stronger positions on the basis of the WQES factors, should not constitute cause for denying the Advanced 2 classification for appellant's position.

ORDER

Respondents' action denying the request for reclassification of appellant's position from Advanced 1 to Advanced 2 is rejected and this matter is remanded to respondents for action in accordance with this decision.

Dated: December 20 1996.

STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

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JUDY M. ROGERS, Commissioner

Parties:

Raj Vakharia  
DNR, AM/7  
PO Box 7921  
Madison, WI 53707

George Meyer  
Secretary, DNR  
PO Box 7921  
Madison, WI 53707

Jon Litscher  
Secretary, DER  
PO Box 7855  
Madison, WI 53707