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GEORGE MICKELSON,

Appellant,

v.

Secretary, DEPARTMENT OF
NATURAL RESOURCES, and
Secretary, DEPARTMENT OF
EMPLOYMENT RELATIONS,

Respondents.

Case No. 95-0182-PC

* * * * *

DECISION
AND
ORDER

This case is an appeal pursuant to §230.44(1)(b), Stats., of the denial of a request for reclassification of appellant's position from Waste Management Engineer - Advanced 1 to Waste Management Engineer - Advanced 2.

Appellant is employed in the Tank Response Unit (TRU), Emergency and Remedial Response Section (ERR), Bureau of Solid and Hazardous Waste Management, Department of Natural Resources (DNR), in a position with the working title of remediation engineer. The most current position description (PD) for this position (Respondent's Exhibit 3) includes the following position summary:

This position is responsible for statewide evaluation and implementation of engineering alternatives for remedial action of petroleum and volatile organic compound contamination resulting from leaking under-ground storage tanks (LUSTs). This position also provides engineering expertise to other Emergency and Remedial Response (ERR) Section programs, including Superfund and the Environmental Repair Program (ERP).

The responsibilities of this position include: (1) completion of technical design manuals for use by other engineers and scientists, (2) researching emerging and innovative soil and groundwater remediation techniques, (3) development of inter-bureau and inter-agency procedures and rules, (4) providing advanced technical and regulatory information to environmental engineering consultants regarding remediation of contaminated soil and water, (5) training Department staff and private sector environmental consultants on engineered remediation systems, and (6) site specific engineering support to other department engineers and scientists.

This position is the statewide expert for scientific evaluation and engineering review of remedial action systems at sites contaminated with volatile organic compounds. It also serves as part of a team of managers and technical experts advising on program directions and regulatory issues. Supervision of the position is limited.

The position requires expertise on numerous and complex remediation methods for treatment of petroleum chemicals and other volatile organic compound contamination. It requires a high level of knowledge and the use of advanced scientific and engineering principles to develop procedures for Department staff, private consultants and other state and federal agencies on remedial actions for soil, groundwater and surface waters contaminated by LUST, Superfund and ERP sites. Much of the work is in areas of new and evolving technologies, requiring frequent professional contacts with nationally recognized experts.

The Waste Management Engineer classification specification (Respondent's Exhibit 1) includes the following definitions of the Advanced 1 and Advanced 2 levels:

Waste Management Engineer - Advanced 1

This is very difficult advanced waste management engineering work. Employees in this classification will typically serve as the department expert in a broadly defined segment of the waste 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 Waste Management - 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 the work in response to program needs as interpreted by the employee with the work being reviewed after the decisions have been made.

Waste Management Engineer - Advanced 2

This is very difficult complex professional waste 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.

Before addressing the specific issues in this case, it should be noted that the general principle governing proceedings of this nature is that the appellant has the burden of proof and must establish by a preponderance of the evidence the facts that would be necessary to show that respondents erred in the denial of his reclassification request, Yranes v. DER, 83-0122-PC (7/19/84); Jackson v. State Personnel Board, Dane Co. Cir. Ct. No. 164-086 (2/26/79). The factual basis for the decision must be solely the evidence presented at the hearing, §227.44(9), Stats.

Appellant's position clearly fits within the Advanced 1 definition. Appellant is the "department expert in a broadly defined segment of the waste management program" -- i.e., LUST. His work crosses program boundaries, involves high level contacts with private sector "consultants and engineers in major industries regarding highly sensitive and complex engineering reviews," and has "significant programwide policy impact." Appellant works very independently with limited review after decisions have been made.¹

With respect to the Advanced 2 definition, there was considerable debate about whether appellant met certain elements. However, it essentially was undisputed that appellant satisfied the requirement of having the "authority to make the final engineering decisions." Appellant's immediate supervisor (Laurie Egge, Chief of the Tank Response Unit) is not an engineer and testified that she does not provide a technical review of appellant's engineering decisions. Bureau Director (Paul Didier) testified that some of appellant's engineering decisions are reviewed if they involve relatively high level policy questions. However, he also testified that the review of appellant's work is no different in this regard than is the case with Gary Edelstein, another engineer in appellant's section whose position respondents approved for the Advanced 2 level. It can be inferred that appellant makes the final engineering decisions within his sphere of authority.

¹ As will be discussed below, appellant has the authority to independently make final engineering decisions within the sphere of his assigned responsibilities.

Another criterion for the Advanced 2 level which the Commission believes appellant satisfied is the requirement that the work "is typically in uncharted areas with essentially no guidance to follow." While respondents contested this element, this was based on the conclusion that this level of work involved only a small part of appellant's time. This in turn was based on the conclusion that the only area of the appellant's PD associated with this level of responsibility is Goal B (5%): "Research and recommend advanced and innovative engineering technologies for the remediation of petroleum and solvent contaminated soils." However, other areas of appellant's PD involving the development of new technical manuals, as well as other activities in the relatively new field of LUST technology, is "in uncharted areas with essentially no guidance to follow." For example, the position summary states that "[m]uch of the work is in areas of new and evolving technologies, requiring frequent professional contacts with nationally recognized experts." Also, appellant's immediate supervisor (Ms. Egge) testified that approximately 60-75% of appellant's work involves "uncharted areas with essentially no guidance to follow."

Appellant does not satisfy certain Advanced 2 criteria. He does not "typically provide direction to other engineers assigned to the project." Appellant is not involved in very much engineering project review, and he infrequently directs engineers. Most of the people who are involved in LUST projects in the field are hydrogeologists, not engineers. Appellant essentially attempts to equate hydrogeologists with engineers for classification purposes, but he has provided little evidence that would support such a finding. Ms. Egge testified that appellant has expertise in both hydrogeology and engineering, and that this was a plus for the program. She further testified that in her opinion, appellant's activities advising hydrogeologists should not be held against him from a classification standpoint. This generalized opinion lacks sufficient foundation and weight to serve as the basis for a finding that this activity can be equated with the direction of engineers for the purpose of an Advanced 2 classification.

Ms. Egge also provided the opinion that appellant's role in putting on "consultants' days," which are designed to share DNR's expertise with the regulated community constitutes "directing" the engineers and scientists in attendance. This opinion cannot be reconciled with the thrust of the language in the Advanced 2 definition--"provide direction to other engineers assigned

to the project." This is consistent with direction more akin to that provided by a leadworker than providing advice and guidance to private sector engineers at a workshop or meeting. Compare, Germanson v. DER, 91-0223-PC (5/20/93) (directory and evaluative role as to outside engineering and architectural firms not supervision for classification purposes). For similar reasons, it cannot be concluded that appellant's development of manuals, policies, procedures, etc., constitutes the direction of engineers.

The other disputed Advanced 2 factors are somewhat interrelated. The Advanced 1 level is characterized as "very difficult advanced waste management work." The Advanced 2 level is characterized as "very difficult complex professional waste management engineer work . . . perform[ing] the most complex engineering reviews for the assigned area."² Appellant's first witness, Bureau Director Didier, testified that the Advanced 2 level "is the classification that is the highest and most complex." Thus the work at the Advanced 2 level is more complex than the work at the Advanced 1 level. Related to this is the requirement at the Advanced 2 level of "the development of policies, standards, procedure development, evaluation and administration." Appellant does have responsibility for this activity, but, in denying the reclassification request, respondents stated that "it is expected that at the Waste Management Engineer-Advanced 2 level, this policy and procedure development relate to very difficult complex professional waste management engineering work. (Respondent's Exhibit 4). While the record reflects that appellant's work is complex in a general sense, appellant did not satisfy his burden of proving that his work is more complex than that associated with the Advanced 1 classification in the context of the foregoing criterion.

Gary Edelstein, a witness appellant called whose position in the Superfund Remedial Unit in the ERR Section had been reclassified to the

² Even though the emphasis of appellant's position is on the development of policies and procedures rather than the performance of engineering reviews per se, this would not necessarily rule out the Advanced 2 level classification if appellant could show that his work was at an equivalent level of engineering complexity. As stated in paragraph I.A. of the class specifications (Respondent's Exhibit 1), it "will not specifically identify every eventuality or combination of duties and responsibilities of positions that currently exist, or those that result from changing program emphasis in the future. Rather, it is designed to serve as a framework for classification decision-making in this occupational area."

Advanced 2 level³ testified that in his opinion, for several reasons, the Superfund program was more complex than the LUST program. This testimony was not rebutted.

Mr. Edelstein also testified as follows about his (Edelstein's) work:

As far as administrative codes go within our program, the--both George [appellant] and I have been chief rule writers on different sections of codes--specifically the NR 700 series. George was responsible for consultant qualification chapter. I believe that ultimately got transferred to somebody else . . . and then the--I was responsible for NR 724 which is the remediation, design and construction section of the code.

Q Would that have covered LUST sites?

A That section of the code covers all sites. So we both have been chief rule writers, and the section he worked on pertains to engineering matters, more administrative or qualification matters than technical matters in terms of design. George was consulted about NR 724, he saw a draft or draft or two or three, as far as policies go, and procedures, for guidance . . . (emphasis added).

The basis for the reclassification of Mr. Edelstein's position to the Advanced 2 level included a PD that is inaccurate to the extent it states at activity D2 that he serves "as the chief statewide ERR program engineering consultant for all policies and administrative codes." As Mr. Edelstein stated above, appellant is responsible for the LUST program in this regard, and Mr. Edelstein also testified that he (Edelstein) is not the chief engineering expert for the LUST program. However, it is undisputed that Mr. Edelstein serves as the chief engineering advisor for two programs--Superfund and Environmental Repair. While appellant consults and interacts across program lines, he is the chief engineering advisor for only one program--LUST. Furthermore, as discussed above, it also is undisputed that the Superfund program is more complex than the LUST program. Thus the comparison of these two positions does not establish that appellant's position should be at the Advanced 2 level.

³ As will be discussed below, the reclassification of Mr. Edelstein's position to the Advanced 2 level was based in part on a partially inaccurate PD, but this factor does not have a material bearing on the outcome of this case.

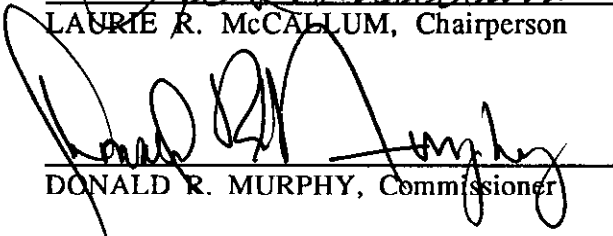
ORDER

Respondent's action denying the request for reclassification of appellant's position from the Advanced 1 level to the Advanced 2 level is affirmed, and this appeal is dismissed.

Dated: July 23, 1996 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

AJT:rcr


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

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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