

appeal from Ostenso v. DER, 91-0070-PC, 4-13-94;
Ostenso v. Wis. Pers. Comm. 94EV1571, Dane County Cir Ct.
3-18-96

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 29, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 96-1777

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

NILE A. OSTENSO,

PETITIONER-APPELLANT,

v.

WISCONSIN PERSONNEL COMMISSION,

RESPONDENT-RESPONDENT.

RECEIVED

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PERSONNEL COMMISSION

APPEAL from an order of the circuit court for Dane County:
GEORGE NORTHRUP, Judge. *Affirmed.*

Before Eich, C.J., Roggensack and Deininger, JJ.

PER CURIAM. Nile Ostenso appeals an order affirming an administrative decision of the Wisconsin Personnel Commission which upheld a lower job classification for Ostenso, a Department of Natural Resources (DNR)

employee, than he believed appropriate. Because we conclude that substantial evidence supports the Commission's decision, we affirm.

Ostenso has been employed at all relevant times as a water resources engineer for the DNR. In 1990, the Department of Employment Relations (DER) created a six-tier classification system for all state-employed engineers. Based on information provided by the DNR, the DER assigned Ostenso to the fourth level. After a re-evaluation, the DER raised Ostenso's classification to the fifth level, known as Advanced 1. Ostenso then appealed to the Commission, asserting that the DER should have reassigned him to the sixth and highest level, as an Advanced 2 engineer.

The class specifications for Advanced 1 and Advanced 2 are as follows:

Advanced 1: This is very difficult advanced water resource engineering work. Employees in this classification will typically serve as the department expert in a broadly defined segment of the water resource program. The area of responsibility will normally cross program boundaries, require continually high level contacts with private consultants, municipal officials, directors of public works, city administrators, industry officials and engineers for 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 Water Resource 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 employee with the work being reviewed after the decisions have been made.

Advanced 2: This is very difficult complex professional water resource 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.

After holding an evidentiary hearing, the Commission employed two analytical methods in reaching its decision to deny Ostenso's appeal. First, the Commission compared Ostenso's work with that of Richard Wedepohl, the lowest ranking DNR water resources engineer in the Advanced 2 classification, and with that of Michael D. Hammer, a low-ranking Advanced 2 wastewater engineer for the DNR with duties deemed comparable to Ostenso's. The Commission found that Ostenso's area of expertise was measurably narrower than that of Wedepohl's and Hammer's, that the latter two men had a substantially wider range of consulting responsibilities and that both performed a measurably greater degree of work in uncharted areas.

Second, the Commission considered Ostenso's duties and compared them to the seven criteria set forth above for the Advanced 2 water resources engineer classification. In evaluating Ostenso according to these criteria, the Commission concluded that Ostenso's duties satisfied only two of the seven criteria. The result of both methods of evaluation was a finding that the water resources engineer-Advance 1 classification best fit Ostenso's position. The Commission therefore affirmed the DER's classification decision.

We affirm an agency's factual determination if substantial evidence supports it. Section 227.57(6), STATS. The test is not whether a preponderance of the evidence supports the Commission's determination, but whether reasonable minds could arrive at the same conclusion reached by the Commission. *State ex rel. Palleon v. Musolf*, 120 Wis.2d 545, 549, 356 N.W.2d 487, 489 (1984). We do not review the agency's decision as to the weight and credibility of the evidence. Section 227.57(6).

Substantial evidence supported the Commission's comparative analysis of Ostenso's work. Ostenso works in the Surface Water Standards Program Unit of the DNR's Surface Water Standards and Monitoring Section. There, "[h]e functions as the unit's technical advisor in the following specialty areas: waste water treatment additives, Zone of Initial Dilution (ZID) and Mixing Zone (MZ), as well as liaison with water quality modeling staff." He is lead technical advisor on MZ issues in the unit and does the most complex MZ work. In his brief, as examples of his most complex assignments, Ostenso cites the work he has done to set effluent limits for a number of waste water treatment plants and his work on chemical control of zebra mussel infestations.

In comparison, Wedepohl works in the Bureau of Water Resources Management in the evaluation and special projects section. "He is solely responsible statewide for designing specific controls for lake restoration and protection projects and for setting standards for use by engineering firms retained by individual communities to complete specific projects." He has specific cross program ties to: Wastewater (discharged to lakes); Tech Services (laboratory certification); Solid Waste (landfill sitings) (hazardous waste cleanup); Air (atmospheric deposition of mercury, PCB's, nutrients); Water Regulation (shoreland zoning and ch. 30 permits); Parks (management of lake use and park

grounds); Fisheries (stocking and habitat improvement practices); and Wildlife (wetland habitat management and new site construction).

Hammer works in the Industrial Wastewater Section of the Bureau of Wastewater Management and has principal duties that include: (1) coordination of the reissuance of all pulp and paper mill permits in conjunction with DNR staff, industry organizations, other states and the EPA; (2) serving as team leader for a multi-disciplinary pulp and paper industry technology team; (3) development and coordination of toxic pollution effluent limitations; (4) preparation of effluent discharge permits and enforcement of same; and (5) review of engineering plans and specifications for proposed industrial wastewater treatment facilities.

In comparing and evaluating the respective duties of these three engineers, the Commission could reasonably infer that Ostenso's area of expertise was measurably narrower, that he had comparatively fewer consulting duties, and that he did less work in complex, uncharted areas. Because Wedepohl and Hammer barely qualified for the Advanced 2 class, the necessary and reasonable conclusion was that Ostenso belonged in the Advanced 1 class.

The Commission could reasonably find that Ostenso also failed to satisfy at least four of the seven criteria for Advance 2 classification. Two of the criteria require that he typically work in uncharted areas and typically provide direction to other engineers assigned to his projects. While the evidence might support a finding that Ostenso functioned in this way on some occasions, the Commission reasonably inferred that he did not do so typically. Additionally, it could infer that his work did not include the development of policies, standards and procedures, nor that he functioned as the chief technical consultant on his projects, other than within his narrow area of expertise. While these criteria are

admittedly subjective in their application to a particular engineer, the Commission was aided by testimony from a DER expert on the engineer classification system. Although Ostenso devotes considerable space in his brief to discrediting the analysis and conclusions regarding his classification, we emphasize, again, that it is not our role to review the Commission's determinations regarding the weight and credibility of evidence. Section 227.57(6), STATS.

By the Court.—Order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)(5), STATS.