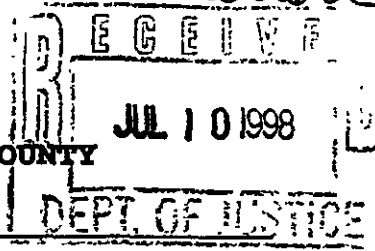


Theodore X



STATE OF WISCONSIN

CIRCUIT COURT
Branch 4

DANE COUNTY

JO ANN PRUST and STEVEN SAUER,

Petitioners,

VS.

Decision and Order

Case No. 97 CV 3328

WISCONSIN, PERSONNEL COMMISSION,

Respondent.

PERSONNEL COMMISSION

JUL 23 1998

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The issue before the court is whether the Wisconsin Personnel Commission (WPC) had a rational basis for granting Respondent Department of Employment Relation's (DER) Motion for Summary Judgment and whether Petitioners' positions should have been reallocated to the Agricultural Program Specialist-Senior series rather than the Attorney 13 series.

REVIEW OF RECORD

1. Petitioner Jo Ann Prust (Petitioner Prust) worked for the Department of Agriculture, Trade and Consumer Protection (DATCP) as "Farm Mediation and Arbitration Program Coordinator" (Exh. 1, respondent's motion dated 10/3/97). The position was classified at the Administrative Assistant 5 level. (Exh. 3 attached to respondent's 10/3/97 motion). The position description stated her job duties as follows:

Under the general supervision of the Director, Bureau of Farm Services, this position coordinates the administration and oversight of the Farm Mediation and Arbitration Program. The position is responsible for the overall and day to day administration of the program. Primary duties include: planning and budgeting time to meet the workload; selection, training and supervision of a sufficient number of volunteer mediators/arbitrators statewide; development and maintenance of administrative rules and operating procedures for the

program; lead technical and legal assistance to volunteer mediators on specific cases, in preparation of final agreements and in general; development and maintenance of a case tracking, reporting and program evaluation system; provisions of program information and outreach to constituencies.

This work requires knowledge and skills in program management, including planning, program evaluation, and public information, but also requires knowledge and skills in conflict resolution, mediation and arbitration, and law. Knowledge and skills in training and volunteer management is also required. Knowledge of agriculture and agricultural laws and regulations is preferred.

Effective April 13, 1997, Petitioner Prust's position was reallocated to an "Agriculture Program Specialist-Senior." In her appeal of the reallocation to the Commission, Petitioner Prust asked that her position be reallocated to the attorney classification series.

2. Petitioner Prust has been licensed to practice law in the State Wisconsin since 1985 and argues that in her capacity as Farm Mediation and Arbitration Program Coordinator, about 35% of the duties of her position involve the practice of law which, allegedly, if not performed by an attorney would constitute "the unauthorized practice of law." Prust Aff. Par. 12. She believes the following duties constitute the practice of law as a provider of legal advice and assistance: a) prepare and/or supervise preparation of legal documents which require a knowledge of law and legal principles not possessed by laymen; b) preside and conduct both formal and informal mediation hearings, which includes assisting the parties with the process of analyzing facts, evidence and precedents in order to develop options for dispute resolution; and c) confer with DATCP staff on the

preparation and revision of Wisconsin statutes and administrative rules regarding mediation/arbitration services and related services under Section 93.51, Stats. (Appellant's brief, pp.2-3, dated 10/31/97.) Respondent disputes that appellant's position has assigned any duties which constitute the practice of law (p. 2, respondent's 10/3/97 motion). Petitioner Prust served on the State Bar of Wisconsin Professional Ethics Committee from September, 1993 to September, 1996 and was reappointed to a second term in September, 1997.

3. Petitioner Steven Sauer (Petitioner Sauer) worked for the DATCP as "Rural Electric Power Services Ombudsman" (Exh. 1, respondent's motion dated 10/3/97). The position was classified at the Administrative Assistant 5 level (Exh. 3 attached to respondent's 10/3/97 motion). The position description stated his job duties as follows:

This position is responsible for the planning, organization, coordination and evaluation of the Rural Electric Power Services Program. This position functions as the Department's liaison and ombudsman on matters relating to rural electric power issues, in particular stray voltage, to farmers, agricultural organizations and service industries, rural electric cooperatives, utilities, and state and federal agencies and organizations. The position performs the following functions: farmer/utility mediation and negotiation; interagency program coordination and administration; policy analysis; overall program planning, development, coordination and evaluation; biennial and operating budget preparation and management; provision of information, analyses, and counseling and referrals regarding electric power problems with respect to legal issues and farm management and production issues.

This position is the lead worker for the program and as such directs and coordinates the activities of the education and research coordinator, the veterinarian and LTE staff. This position coordinates the activities of the Stray Voltage Advisory Council. This

position also represents the Department at formal proceedings before the Wisconsin Public Service Commission, on Department of Commerce committees related to Chapter 16 electrical code, and at legislative hearings.

This position reports to the director of the Bureau of Farm Services and makes recommendations on policies, program actions and Stray Voltage Advisory Council appointments to the Secretary.

This position requires skills, knowledge, and experience with: mediation and negotiation techniques; program management and evaluation; budget development and administration; policy analysis; education methods; verbal and written communications; state and federal statutes and administrative rules relating to and affecting: farm operations, utility and rural electric cooperative organization and management, tort claims, and dispute resolution; dairy herd management; activities and operating practices of utilities and rural electric cooperatives; electrical distribution systems; electrician licensing; private sector stray voltage mitigation products and services; and programs providing farmers with financial, legal, and social services. This position requires the ability to coordinate efforts and services with other agencies in state government, other programs in the Department, and a variety of public and private organizations.

Effective April 13, 1997, Petitioner Sauer's position was reallocated to an "Agriculture Program Specialist-Senior." In his appeal of the reallocation to the Commission, Petitioner Sauer asked that his classification be reallocated to the attorney classification or the administrative officer classification series.

4. Petitioner Sauer has been licensed to practice law in the State of Wisconsin since 1992 and argues that about 35% of the duties of his position involve the practice of law which if not performed by an attorney would constitute "the unauthorized practice of law." Sauer Aff. Par. 13. Petitioner Sauer believes

the following duties constitute the practice of law (appellant's brief, pp. 2-3, dated 10/31/97): a) provide legal advice and assistance to farmers who seek help through DATCP's Wisconsin Farm Center; b) provide legal information to farmers with electrical service problems, including those with stray voltage and/or power quality concerns; c) analyze proposed legislative bills and administrative rules including interpretation of impact and suggestion of alternatives; d) may appear before the legislature to clarify the content of proposed administrative rules; and e) preside at and conducts both formal and informal mediation hearings, which includes provision of assistance and advice to parties as well as to mediators in the program. Respondent disputes that appellant's position has assigned any duties which constitute the practice of law (p. 2, respondent's 10/3/97 motion).

5. The DER disputes the assertion that Petitioner Prust's and Petitioner Sauer's positions are assigned duties which constitute the practice of law. DER's 10/3/97 Motion at p. 2.

6. Both Petitioner Prust and Petitioner Sauer are members of the Agricultural Law Association at the request of DATCP and their dues for that organization are paid by the DATCP. Appellants' Brief, Sauer Aff., Exh. A-1 and Prust Aff., Exh. A-2.

7. The classification specification of Agriculture Program Specialists was created effective April 13, 1997 to include both Petitioner Prust's and Petitioner Sauer's positions. The definition of Agricultural Program Specialist-Senior

classification as stated in Exh. 2 of the Respondent Prust's 10/3/97 motion is as follows:

Agricultural Program Specialist-Senior

Allocated to this classification, under general supervision, are: (1) Coordinator for the Farm mediation Program; and (2) Ombudsman for the Rural Electric Power Services Program.

(1) The Coordinator for the Farm Mediation Program is responsible for administering the farm mediation and arbitration program which includes selecting, developing, and overseeing volunteer mediators; providing technical and legal assistance to volunteers, other program constituencies, and the general public; and performing mediation and arbitration services in special cases. The position is also responsible for preparing plans to handle the caseload; preparing federal grant applications; developing administrative rules and operating procedures; preparing program evaluations; coordinating program activities; and recommending program changes and goals.

(2) The Rural Electric Power Services (REPS) Ombudsman is responsible for coordinating, planning, organizing, overseeing, and evaluating the REPS program. The position functions as the Department of Agriculture, Trade and Consumer Protection's ombudsman and liaison on matters relating to rural electric power issues—particularly stray voltage—to farmers, agricultural organizations and service industries, investor owned utilities and rural electric cooperatives, and state and federal agencies and organizations. The position is responsible for overall program planning, development, coordination and evaluation; policy analysis; providing information, analyses, counseling, and referrals regarding legal, management and production issues; individual case farmer/electric power provider negotiations and mediation; interagency program coordination and administration; preparing biennial budget initiatives; overseeing the planning, developing and implementing of educational, informational, and outreach efforts; and overseeing and directing the activities of the rest of the REPS staff.

8. The Position Standard for attorney positions in classified service indicates the "position standard encompasses all capacities and levels of work in the classified service that

require a license to practice law in the State of Wisconsin.” (Exh. 4 attached to respondent’s 10/3/97 motion.) At the time Petitioner Prust and Petitioner Sauer were hired there was no requirement in place to possess or obtain a license to practice law in the State of Wisconsin for the positions they held. (Exh. 3 attached to respondent’s 10/3/97 motion.)

9. The Position Standard for the Attorney 13 position has three allocation patterns as follows:

Attorney 13 . . . Definition: This is responsible professional work involving the provision of legal services. Positions allocated to this level function as: 1) Administrative Hearing Examiners; or 2) Staff Counsel in a narrow area of specialization such as document drafting, legal research, or administrative rules development or; 3) legal advisors for a singular and narrowly defined program area.

10. The Position Standard for positions classified as Administrative Officer 1 (Exh. 5 to Respondent Sauer’s 10/3/97 motion), defines the classification as follows:

This is responsible and difficult administrative and/or advanced staff assistance work in a major state agency. Employees in this class are responsible for directing important phases of the department’s program and/or for providing staff services in a variety of management areas. Work may involve assisting in the formulation of the agency’s policies, the preparation of the budget, responsibility for fiscal management, physical plant, operating procedures, personnel and other management functions. Employees supervise a staff of technical and/or professional assistants and have a wide latitude for planning and decision making guided by laws, rules and departmental policy. Direction received is of a broad and general nature and the work is reviewed by administrative superiors through reports and conferences.

CONCLUSIONS OF LAW

I. Standard of Review

Under Wehr Steel Co. v. DILHR (App. 1981) 102 Wis. 2d 480, 307 N.W. 2d 382, modified on other grounds 106 Wis. 2d 111, 315 N.W. 2d 357, 360-361:

...a court upon review will affirm the findings of [an agency] if there is any credible evidence to sustain those findings. The fact that the evidence is in conflict is not a sufficient basis for the reversal of the findings of [an agency]. Even if the findings are contrary to the great weight and clear preponderance of the evidence, the reversal is not commanded because it is not the function of the reviewing court to determine whether the findings that were not made should have been made or could have been sustained by evidence. Rather, the inquiry is whether there is any credible evidence to sustain the findings that were in fact made. It is the function of the [agency], and not the reviewing court, to determine the credibility of evidence or witnesses and it is for the [agency] to weigh the evidence and decide what should be believed...However, a court is not bound by the [agency's] determination of a question of law...However, it should be noted that a reviewing court should hesitate to substitute its judgment for that of an agency even on a question of law if a rational basis exists in law for the agency's legal analysis and it does not conflict with the relevant statute's legislative history, prior decisions and constitutional prohibitions. But a reviewing court may set aside or modify agency action, or remand the case, if it finds the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action.

Also, if an agency's interpretation of a statute is one among several reasonable interpretations that can be made consistent with the purpose of the statute, a court must affirm the agency's choice. DeLeeuw v. DILHR, 71 Wis. 2d 446, 449, 238 N.W. 2d 706 (1976). Where an appeal involves review of the interpretation and application of statutes -- issues of law which are generally reviewed de novo, the court accords varying degrees of deference to an administrative agency's interpretation of a statute it has

been legislatively charged to administer. The court will defer 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." Carrion Corp. v. Wisconsin Department of Revenue 179 Wis. 2d 254, 264-265, 507 N.W.2d 356 (Ct. App. 1993) and West Bend Educ. Assoc. v. WERC, 121 Wis. 2d 1, 11-12, 357 N.W.2d 534, 539 (1984). In West Bend, the court also stated that "where a legal question is intertwined with factual determinations or with value of policy determinations...[we] should defer to the agency which has primary responsibility for determination of fact and policy."

II. The "Practice of Law"

Petitioner Prust and Petitioner Sauer argue that the court should determine whether any of their job duties involve the practice of law and if so, the court should find that their positions should be placed in the attorney series regardless of what percentage of the duties assigned to their positions constitute the practice of law.

There is no clear definition for the "practice of law". In State ex rel. Reynolds v. Dinger, 14 Wis. 2d 193 (1961), the Supreme Court of Wisconsin states that it is the "exclusive power of the supreme court of Wisconsin: (1) To

determine what is the practice of law, (2) to establish the qualifications of persons entitled to engage in such practice, (3) to license these persons who have qualified themselves, by education, training, examination, and character to exercise such franchise, and (4) to exercise supervisory and disciplinary control over such licensees." In Petitioner's Brief at p. 13, Petitioners cite State ex rel. State Bar v. Keller, 16 Wis. 2d 377 in which the court stated that the "practice of law comprises among other things, the following:

- (a) The giving of legal advice and instruction to clients to inform them of their rights and obligations.
- (b) The preparation for clients of documents requiring knowledge of legal principles not possessed by ordinary laymen.
- (c) The appearance for clients before public tribunals which possess power and authority to determine the rights of such clients according to law, in order to assist in the proper interpretation and enforcement of law."

Petitioner Sauer argues that he meets these three criteria while Petitioner Prust argues that she meets two out of the three criteria and therefore, they are "practicing law per their job description." The criteria listed in State ex rel. State Bar v. Keller, however, is not determinative of what is the "practice of law."

Attorneys involved in the active practice of law "at any time" in Wisconsin must comply with the continuing educational requirements established by the Supreme Court and file CLE Form 1 with the Supreme Court every other year pursuant to SCR 31.03. The only individuals exempted from this requirement under SCR 31.04 (2) are those who do not "engage in the practice of law in

Wisconsin at any time during the report period." Petitioners argue that for the purposes of filing CLE Form 1 and complying with the continuing educational requirements, an individual practices law if they practice law "at any time" regardless of any other factors. They further argue that it follows that they do engage in the "practice of law" even if 100% of their job duties do not constitute the practice of law. Since 35% of their job duties entail the practice of law, they do practice law "at any time." However, under SCR 31.04(2), the Supreme Court only exempted individuals who do not "engage in the practice of law in Wisconsin at any time during the report period" for purposes of complying with the continuing educational requirements for attorneys. The Supreme Court only stated that for the purpose of meeting continuing educational requirements, certain attorneys must file and others may not but did not address what the definition of the "practice of law" would be for other purposes such as job classifications. The Supreme Court merely states that if an attorney practices law at any time, he/she must comply with the educational requirements but does not state that if an attorney is found to be engaged in the practice of law at any time, he/she should be given the title of an attorney or placed in an Attorney classification series.

III. Positions in the Attorney Series

The Position Standard for attorney positions in classified service indicates the "position standard encompasses all

capacities and levels of work in the classified service that require a license to practice law in the State of Wisconsin." (Exh. 4 attached to respondent's 10/3/97 motion.) At the time Petitioner Prust and Petitioner Sauer were hired there was no requirement in place to possess or obtain a license to practice law in the State of Wisconsin for the positions they held. (Exh. 3 attached to respondent's 10/3/97 motion.) As stated in the Commission's Findings of Facts, The Position Standard for the Attorney 13 position has three allocation patterns as follows:

Attorney 13 . . . Definition: This is responsible professional work involving the provision of legal services. Positions allocated to this level function as: 1) Administrative Hearing Examiners; or 2) Staff Counsel in a narrow area of specialization such as document drafting, legal research, or administrative rules development or; 3) legal advisors for a singular and narrowly defined program area.

It is necessary to continuously place various positions within the established classifications and it would be impossible to predict and list every type of position which may arise at the DATCP. As stated in Respondent's Brief at p. 2:

"when the Secretary of DER develops a classification, the Secretary ascertains and records the duties, responsibilities and authorities of the position, using appropriate job evaluation methods. Sec. 230.09(2), stats. A classification is not necessarily limited to a particular position. Indeed Sec. 230.09(1) , provides in part, "each classification so established shall include all position which are comparable with respect to authority, responsibility and nature of work required. Each classification shall be established to include as many positions as are reasonable and practicable."

The definition of the Position Standard for Attorney 13 provides a guideline of what positions may fall within the Attorney 13

series and it is acknowledged that the definition by no means provides an exhaustive list.

In determining what classification a particular position belongs to, courts have applied the "majority of job duties" test. In its Ruling, the Commission applied this test and cited several cases in which it has applied the test. See Commission's Ruling on Respondent Prust's Motion to Dismiss at p. 5 and Commission's Ruling on Respondent Sauer's Motion to Dismiss at p. 5. Under the "majority of job duties" test, it is the majority of job duties which is relevant in determining to which classification a particular position should be allocated. Applying the "majority of job duties" test to the case at hand, since the majority of Petitioners' job duties, 65% assuming 35% of their duties constitute the practice of law, fit best within the Agriculture Program Specialist-Senior series, the positions should be so allocated to that position.

After comparing the Petitioners' position descriptions to the various class specifications, the Petitioners' positions seem to best fit the Agriculture Program Specialist-Senior series. The majority of Petitioner Prust's duties fall within the Class Spec definition of Agriculture Program Specialist-Senior, while only of 35% of her job duties possibly fall within the standard position for classification as an Attorney 13. (Commission's Ruling on Prust's Motion to Dismiss at p. 5.) Although the Administrative Officer 1 position standard could be said to describe Petitioner Sauer's duties in general terms,

(Commission's Ruling on Sauer's Motion to Dismiss at p. 6)
petitioner Sauer's position fits best within the Class Spec
definition of Agriculture Program Specialist-Senior.

The parties dispute whether any of Petitioners' job duties require a license to practice law. Respondent argues that the positions do not require a license to practice law. The Position Standard for attorney positions in classified service indicates the "position standard encompasses all capacities and levels of work in the classified service that require a license to practice law in the State of Wisconsin." (Exh. 4 attached to respondent's 10/3/97 motion.) At the time Petitioner Prust and Petitioner Sauer were hired there was no requirement in place to possess or obtain a license to practice law in the State of Wisconsin for the positions they held. (Exh. 3 attached to respondent's 10/3/97 motion.) Although an attorney may meet and successfully fulfill the requirements and job duties of Petitioners' positions, it does not follow that if the positions are filled by attorneys, the job description or requirements should change. There were no requirements in place demanding that applicants to the positions at issue possess valid licenses to practice law. The training and experience requirement of the position description stated only that a "law degree with emphasis on Administrative Law, Tort Law, and Dispute Resolutions is highly desirable." Although having a license may indirectly be beneficial to the DATCP and to those whom the petitioners assist during the course of their jobs, the fact that Petitioners hold


licenses should not be determinative of which classification their positions fall under.

The Wisconsin Personnel Commission had a rational basis for granting Respondent DER's Motion for Summary Judgment and Petitioners' positions should have been reallocated to the Agricultural Program Specialist-Senior series rather than the Administrative Officer 1 or Attorney 13 series.

Accordingly, the Commission's Ruling should be, and hereby is, AFFIRMED.

Dated this 8 day of July, 1998.

BY THE COURT:



Steven D. Ebert
Circuit Court Judge