STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JAMES STEINKE, Appellant,

v.

Secretary, DEPARTMENT OF NATURAL RESOURCES and Director, OFFICE OF STATE EMPLOYMENT RELATIONS, Respondents.

Case 543
No. 62753
PA(der)-5

(Previously Case No. 02-0052-PC)

Decision No. 31103-A

Appearances:

Richard L. Binder, Attorney at Law, 607 North 8th Street, Sheboygan, Wisconsin, 53081-4556, appearing on behalf of James Steinke.

Dan Graff, Assistant Legal Counsel, Department of Natural Resources, 101 South Webster Street, P.O. Box 7921, Madison, Wisconsin 53707-7921, appearing on behalf of the Department of Natural Resources and the Office of State Employment Relations.

FINAL DECISION AND ORDER

This matter is before the Employment Relations Commission on Appellant's appeal of Respondents' decision to deny Appellant's request for reallocation/reclassification of his position from Fisheries Technician to Fisheries Technician-Advanced. The case was filed with the Wisconsin Personnel Commission. While it was still pending, the Personnel Commission was abolished pursuant to 2003 Wis. Act 33, effective July 26, 2003, and the authority for processing this matter was transferred to the Wisconsin Employment Relations Commission. A hearing was held in this matter on January 26, 2004 before Commissioner Paul Gordon as the designated hearing examiner, on the following issues:

> [W]hether the respondent's decision to deny the request for reallocation of appellant's position from fisheries technician [to] fisheries technician advanced was correct. If not, whether appellant's position should be [f]illed by regrade of the appellant or by competition. Additionally, the parties have not stipulated or agreed as to the effective date. The appellant believes the effective date should be February 15, 2001. The DNR had been willing to stipulate to an effective date of September 2002. (Transcript, p. 6)

After the hearing, a briefing schedule was established and all briefs were filed by June 14, 2004. The hearing examiner issued a proposed decision on October 7, 2004. Respondents requested oral argument which was held on January 31, 2005, and the Commission has consulted with the examiner. For the reasons set forth below, the Commission concludes that as of the effective date, the Appellant's position was better described at the Fisheries Technician level. In doing so, the Commission rejects the conclusion set forth in the proposed decision. The Commission has also substantially revised the organization of the decision, revised language to better reflect the record, revised the analysis, supplemented the description of relevant procedural history and addressed matters referenced during oral argument before the Commission.

James Steinke held a position classified as Fisheries Technician 3 in the Department of Natural Resources at the Kettle Moraine Springs Fish Hatchery (KMSFH) when a survey of Fisheries Technician positions was completed in 2000.[1] As a result of the survey, the classification series was condensed and some positions formerly classified at the Fisheries Technician 3 level were reallocated to the new classification of Fisheries Technician (FishTech), while others were reallocated to the new Fisheries Technician-Advanced (FT-Advanced) level. Steinke's position was reallocated to FishTech level. Steinke filed a timely appeal (Case No. 00-0127-PC), seeking reallocation to FT-Advanced. Immediately prior to the scheduled hearing, the parties reached an agreement pursuant to which Steinke would withdraw his appeal with the understanding that he would submit a new request to review the classification of his position. As agreed, Case No. 00-0127-PC was dismissed and Steinke forwarded a revised position description to DNR human resources staff in February 2001. However, it was not until the position description had undergone several additional revisions that the requisite persons agreed to the accuracy of the document. It was this position description dated September 9, 2002, that served as the basis for a formal classification review and resulted in a denial letter dated December 3, 2002. Steinke promptly appealed the matter and it was ultimately assigned No. 62753 by the Commission. This is the matter presently before the Commission.

The classification specifications for FishTech state in pertinent part:

B. Inclusions

> This classification encompasses positions found within the Department of Natural Resources' basins and fish production facilities throughout the state. These positions are involved in a variety of program support activities such as the repair and maintenance of fyke nets; spawning various species of fish; rearing fish; planting fish fry and fingerlings; creel census; lake and stream surveys; data tabulation; and stream and lake habitat development design and planning projects.

[1] Information in the Proposed Decision relating to Appellant's earlier work history is not relevant to the classification determination.

C. Exclusions

Excluded from this classification are the following types of positions:

. . .

2. Positions which are, for a majority of time, engaged in technical paraprofessional fisheries management activities and are more appropriately classified within the Fisheries Technician-Advanced classification specification.

DEFINITIONS

FISHERIES TECHNICIAN

Positions allocated to this classification: (1) participate in the extraction and collection of spawn; forage minnow and zoo plankton collection and distribution; propagation and rearing of warm/cool/cold water fish species; disease control; harvest and distribution of fish to lakes and streams; and maintenance of facilities, grounds and equipment; (2) participate in the rearing of fish in hatcheries and ponds which includes chemical treatments, monitoring and controlling of rearing environments, and the feeding process; (3) perform creel census by recording fishing pressure counts, interviewing angles, and collection and summarizing biological data; (4) function as a member of the region operations crew constructing and maintaining netting gear and equipment; performing warm/cool/cold water propagation activities; performing habitat development and habitat maintenance on state properties and easements; or (5) perform a variety of development and implementation activities as an assistant to a Fisheries Technician-Advanced, Fisheries Biologist or Natural Resources Supervisor. Work is performed under general supervision.

Representative Positions:

Crew Leader- Perform work in warm/cool/cold water fish propagation to include spawning, forage, rearing, harvesting, distribution, net and seine repair and construction. Serve as crew chief during spawning and forage operations with responsibility for assigned personnel and equipment; train and instruct Limited Term Employees and permanent staff in methods, procedures and aspects of warm/cool/cold water fish propagation.

Propagation Technician – Perform technical propagation operations including egg incubation, disease control, water level control, water quality monitoring, detailed record keeping, and outlying forage collection for hatchery productions. Monitor and observe the condition of eggs, fry and water quality and make needed corrections and adjustments when necessary.

Creel Census Clerk – Under the direction of the Treaty Assessment Biologist/Fisheries Technician-Advanced, conduct angler counts and interviews on lakes and streams to collect information to help determine fishing pressure, catch, harvest, and exploitation of the fishery. Provide field summarization of survey data. Assist field crews in surveys of selected lakes and streams. Serve as a point of contact for the public on a broad area of resource questions. Assist in educating and delivering information to the public on aquatic habitat protection.

Fisheries Crew Leader – As a member of the Regional Fish Habitat Subteam, conduct lake and stream surveys to gather data on warm/cool/cold water fishery populations; implement stream and lake habitat development projects; implement the region operations warm water propagation program; construct and maintain seines, and fyke nets; direct permanent, seasonal and Limited Term Employees; and coordinate cooperative projects with clubs and volunteers.

Fisheries Technician – Provides technical support to the Southeast Region's (SER) Lake Michigan Work Unit including assisting in the assessment and surveying of sport fisheries and fish population in SER Lake Michigan waters and tributary streams; assisting in the maintenance of databases complied during Lake Michigan salmonid assessment; and disseminating written and verbal information in response to request by staff and the public.

. . .

The classification specifications for FT-Advanced state in pertinent part:

B. Inclusions

The positions in this classification are technical paraprofessional positions located within the Department of Natural Resources which perform a full range of fisheries management activities within fish production facilities or basins throughout the state.

C. Exclusions

. . .

2. Technical positions whose primary emphasis is performing technical support activities within the Fisheries program and are more appropriately classified within the Fisheries Technician Classification specification.

. . .

D. Definition of Terms Used in This Specification

Paraprofessional – A type of work closely relating to and resembling professional level work, with a more limited scope of functions, decision-making and overall accountability. A paraprofessional position may have responsibility for segments of professional level functions, but is not responsible for the full range and scope of functions expected of a professional position.

DEFINITIONS

FISHERIES TECHNICIAN-ADVANCED

Positions allocated to this classification are responsible for technical paraprofessional fisheries management activities which have significant scope and impact. These positions: (1) have a major role in developing the annual production plan for a fish production facility and have specific independent responsibilities for carrying out that plan, including prepare ponds or other raceways for production; prepare fertilizing and forage schedules; sample and monitor fish for health, growth and condition factors; sample and monitor ponds for water quality, fertility, abundance of zoo plankton and forage minnows; maintain statistical data; and generate production reports; (2) perform the full range of technical paraprofessional fisheries activities for a specific portion of the fisheries program in a basin(s); or (3) perform the full range of technical paraprofessional fisheries management technician duties with responsibility for the development, design and implementation of fisheries management projects. These positions have independent responsibility for the design and implementation of fisheries management projects which may include habitat development and planning, conducting, and interpreting analytical studies and preparing or assisting in the preparation of technical publications and reports. The work is performed with significant delegation and under general supervision.

Representative Positions:

Pond/Rearing Station Foreman – As the Pond/Rearing station Foreman, oversee and provide direction for all aspects of fish rearing and harvest operations at a warm/cool/cold water fish production facility. Propose renovation projects for the facility. Conduct administrative duties and tasks as assigned by the hatchery supervisor or regional operations coordinator.

Hatchery Foreman, Governor Thompson Hatchery Spooner – Oversee a computer operated water supply, well water, water filtration, degassing, egg incubation, rearing pond aeration and wastewater discharge system. Coordinate and oversee the daily operation of all coldwater fish egg incubation, fry and fingerling distribution and compile all data necessary to generate hatchery production reports. Audit and participate in all phases of operational planning to insure that statewide fish production goals are met. This position requires WPDES wastewater certification.

Fish Culturist, West Central Region – Produce forage minnows and develop and maintain all fish propagation land, facilities and equipment. Direct intensive forage rearing at DNR ponds, leased private ponds, US Army ponds at Ft. McCoy, and numerous sewerage treatment ponds. Purchase supplemental forage from private vendors in Wisconsin, Minnesota and South Dakota; and manipulate conditions to assure a hatch of fathead minnow fry when transferring fingerling fish to rearing ponds.

Winnebago System Technician – Provide technical support for the Winnebago System Biologist, the Winnebago Fisheries Biologist and the Winnebago Sturgeon Biologist. Perform field activities related to construction and monitoring of breakwall and other structures used in the Winnebago System Habitat Restoration Program. Conduct fisheries and aquatic surveys to gather data on biota and habitat response to long term habitat restoration within the Fox-Wolf-Winnebago System. Coordinate Winnebago System data management and computer workstation needs. Administer the Winnebago System long term Fish Tagging Program; record keeping, public contact, and data tabulation and summaries. Maintain computerized stocking data base. Age fish using approved techniques and operate fisheries equipment.

Upper Wisconsin Basin Technician – As a member of the Basin Team, perform a wide range of activities in support of the fisheries program in Vilas County. Duties include planning and conducting biological surveys; technical and scientific report preparation; stream and lake habitat development, rehabilitation and maintenance planning for and developing shore-based fishing access; public information and education; and assisting with aquatic habitat protection efforts within the Basin.

Lake Michigan Fisheries Technician – Works primarily on the Lake Trout restoration on Lake Michigan and is a member of the DNR Lake Michigan Sub-Team. Conduct a wide variety of surveys to collect population data on all life stages of lake trout in order to meet the goals of establishing natural reproducing lake trout under the guidance of the Great Lakes Fishery Commission. Interpret lamprey wounding rates on lake trout for Lake Michigan and submits annual report. Analyze and compile field data, age lake trout, maintain tag return file and lake trout computer database. Summarize survey data, prepare tables and figures for reports, and draft reports on selected lake trout surveys. Serve as the lead technical position that oversees the Lake Michigan food habits study. Develop and adapt computer data entry formats and statistical report formats to facilitate diet data analysis. Coordinate and oversee collection, tabulation, and analysis of data on diets of trout and salmon and drafts sections of annual report. Prepares draft sections of annual salmon food habits report. Coordinate brook trout assessments and participate in other fisheries surveys and projects as needed and available.

Fisheries Technician – Collect, tabulate and assist in analyzing fisheries and limnological data including creel surveys, assessments of fisheries including relative abundance indices, population estimates, mortality and survival rates, water thermochemistry analysis, aquatic vegetation surveys and surveys of fisheries habitat quality such as IBD (Index of Biotic Integrity) based analysis. Age fish using approved techniques. Prepare data and assist/prepare management reports. With a biologist, design and implement habitat development or improvement projects. Direct permanent, project and limited term employees and coordinate cooperative fishery projects with volunteers. Maintain fisheries facilities, equipment and properties as assigned. Operate boats and other specialized equipment to obtain necessary fisheries data. Provide information and education services to the public. Assist with other regional work. Conduct administrative duties and other tasks as assigned.

Treaty Assessment Technician – Conduct lake and stream surveys to gather data on cool and warm water fish populations and their habitat. Plan and support angler harvest survey program in a large geographic area. Age fish using approved techniques. Design, plan and implement fisheries surveys; collate and summarize survey data. Construct, operate, and maintain fish sampling equipment. Coordinate cooperative fishery projects. Use commercial and specialized computer program to enter fisheries data for analysis as per requirements of the State-Tribal Inland Technical Working Group and WDNR data base protocol.

. . .

The 300-acre KMSFH hatchery includes three separate buildings used for the cold-water production of various species or strains of fish for Lake Michigan. The hatchery acreage also includes outside raceways, a lower pond facility and a separate smaller rearing station located a few miles from the main buildings. Personnel at KMSFH are organized so that a separate position is assigned to each cold-water building and each building is used for one strain of steelhead trout. This organizational structure is unique among the state fish hatcheries and arises, at least in part, from the fact that each of the main buildings has a separate water supply.

Mr. Steinke is assigned to the Building #1 system which includes the hatching tubs and tanks inside the building as well as the several raceways outside the building. Building #1 is a cold-water facility used primarily for a wild strain of trout, the Skamania steelhead. When Building #1 is empty after the Skamania operation it may be used for incubating other fish such as Coho salmon. Mr. Steinke is also assigned to the hatchery's ponds which are used for rearing species such as walleye, northern pike and bass. All three technicians share assignment to an auxiliary hatchery, several miles away from the primary buildings, that is used to raise a fourth strain of steelhead.

Sometimes the employee assigned to one of the production buildings will need help from one or both of the employees from the other two buildings. For example, Mr. Nelson (Building #2) might obtain assistance from Mr. Steinke (Building #1) and Mr. Hron (Building #3) and would typically direct the activities of Steinke and Hron while they are working in Building #2.

DNR operates 14 fish hatcheries.

The three positions currently occupied by Steinke, Nelson and Hron were all reallocated in the 2000 classification survey to the FishTech classification.. Mr. Hron has a request pending to reclassify his position to FT-Advanced.

At all relevant times, Randall Link has filled the position of hatchery supervisor/manager and has served as first-line supervisor for all other positions at KMSFH. The only other permanent position at KMSFH is that of hatchery foreman, which became vacant in June 2001 and had not been filled by the time of the hearing in this matter. Between two and nine limited term employees also work at the hatchery during the course of the year, performing various duties. Each of the three building managers periodically directs the work of some of the limited term employees and summer interns and each is assigned, on a rotating basis, to carry out the weekend operation of the entire facility. While the foreman position has been vacant, Steinke has temporarily performed some of the duties normally carried out by that position.

Prior to June 2001, Terrance Freije filled the position of foreman at KMSFH. The relevant position description includes the following summary:

> The focus of this position is a fish culturist at Kettle Moraine Springs the sole wild steelhead production facility for Lake Michigan. The responsibilities of this position require knowledge of fisheries culture, fish diseases and pathogens, environmental compliance standards, lead worker skills, planning expertise and written and oral communication skills. This position assists with production of fish operation of a statewide fish propagation facility. A variety of state and federal regulations must be understood. Fish culture programs under this position's direction operate under the general supervision of the propagation manager. Provide information and education to the public. Act as lead worker.

Goal A of the foreman position description encompassed 70% of the incumbent's time and it reads:

> Performance of and direction of other staff for the cold water propagation techniques used in the culture of trout and salmon (80% wild strains) for the fish management stocking program, especially Lake Michigan. Performance of and direction of other staff performing techniques used in propagation of coolwater species (limited program).

An activity unique to KMSFH is propagation of the entire wild steelhead population stocked in Lake Michigan. Propagation of this fish population starts with collecting wild steelhead in streams, removing spawn and sperm at streamside, fertilizing the eggs and incubating them at the hatchery, rearing hatched fish to fry and fingerlings in the various tubs, pools and raceways for each building at the hatchery, and distributing them back into the wild. Steelhead at the hatchery are fed by adjustable automatic feeders so the wild strains do not draw a connection between the presence of people and the feeding process. Steinke designed and built the 97 automatic feeders at the hatchery. He, along with the other technicians at the facility, monitors and records data relating to fish development, feeding patterns, health, weight and mortality and periodically provides his superiors with key production information based on the data. The KMSFH technicians may carry out special studies, usually at the direction of another DNR employee. The technicians administer therapeutics, pesticides and disinfectants as needed. They prepare, monitor and maintain hatching tubs, tanks, raceways, and the water filtration system for each building system. They monitor and maintain ph, oxygen, iron, temperature and bacteria levels within certain parameters. When the fish reach various stages of development they are transported, sometimes by Steinke, to stocking and other rearing sites. There is a small population of wild brood stock maintained at the hatchery.

Steinke's PD dated September, 2002 is an accurate, but incomplete, description of the work and duties he was performing before June of 2000 until September of 2002. It reads, in part, as follows:

POSITION SUMMARY

The focus of this position is a fish culturist at Kettle Moraine Springs Fish Hatchery, the sole wild steelhead production facility for Lake Michigan. The position plans, implements and operates Hatchery building #1 system, the Lower Rearing Area Facility, all coolwater spawning and rearing operations, all offstation salmonid spawning, all net construction and repair and all woodworking activities. This position directs operations in these areas in the absence of Hatchery Supervisor.

KMSFH Building #1 produces all of the wild Steelhead stocked in Wisconsin waters of Lake Michigan each year. This position is ultimately responsible for the design, construction and management of funded propagation projects within the Building #1 System.

The position requires an advanced knowledge of fish propagation including genetics protocols, spawning techniques, egg incubation and development, larval stages of salmonids, fish disease and pathogens and fisheries culture. Person must have good lead worker, communication and record keeping skills. Knowledge also includes safe equipment operation, equipment maintenance, and a variety of state and federal regulations. Incumbent must have a commercial driver's license, be a licensed commercial pesticide applicator and be able to plan, direct and implement a major portion of Wisconsin's Wild Steelhead Propagation Program.

The Steelhead propagation program results in millions of dollars of revenue for the Coastal Communities of Lake Michigan. This position is responsible for maintaining the put, grow and take fishery that provides Wisconsin anglers with one of the most outstanding Steelhead fisheries in the nation.

In addition to the Lead Technician duties and responsibilities listed above, the incumbent is also responsible for directing the design, construction and maintenance of all mechanical feeders, directing all woodwork at the facility, and operating water and sludge retention ponds to meet discharge standards.

Time %	Goals and activities
50% A.	Plan, implement and direct fish propagation activities in the Building #1 Hatchery System and Lower Rearing Area System.
(25%)	A1. Propagate wild trout and salmon strains including Steelhead, Coho and Chinook Salmon. Implement and direct initial feeding operations for 300,000 steelhead including monitoring and directing operation of automated feeder systems.
(10%)	A2. Responsible for operations and maintenance of water filtration and water treatment systems to include retention ponds, bacteria culture substrate and water level control
(10%)	A3. Responsible for fish health, monitoring and disease control. Perform field diagnostics, summarize and report to supervisor. Direct and implement facilities disinfection between production lots
	A4. Submit required reports on feed efficiency, growth and mortality to supervisor.
	A5. Direct and conduct maintenance on 97 various automated feeders.
	A6. Maintain a certified pesticide applicator's license.
20% B.	Plan, implement, direct field operations for coolwater fish propagation.
(10%)	B1. Assist in capture of coolwater species broodstocks from lakes and streams using electrofishing and netting. Responsible, for spawning and fertilizing eggs using bentonite to control egg adhesiveness. Implement and direct pond harvest and distribution, submit final rearing pond report to Supervisor.
(5%)	D1. Direct construction and repair of fyke nets, seines and other specialized nets for monitoring and harvest of various life stages of cold and coolwater species.
	B2. Enumerate eggs, measure eggs into incubation jars, submit egg inventory survival reports to supervisor.

B3. Responsible for administering therapeutics to control fungus on eggs. Perform field diagnostics on pond fish, report to supervisor.

B4. Prepare eggs for transport to hatchery or co-op rearing facility. Enumerate hatched fry for distribution and transfers. Transport fry via oxygenated bags and/or distribution tank trucks.

B5. Implement and direct preparation of ponds for rearing fry to fingerling. Plan and direct pond fertilization, algae and zooplankton seeding. Capture zooplankton from wild sources for pond seeding.

B6. Monitor pond conditions, fish growth and water quality parameters. Recommend forage minnow requirements to supervisor based on observations and documented growth rates.

15% C. Planning, implementation and direction of salmonid spawning operations at off station broodstock collection facilities.

(10%) C1. Collect fertilized trout and salmon eggs utilizing accepted spawning and genetics protocols, with the objective of meeting goals of Lake Michigan Management Plan.

C2. Responsible for administering vitamins, or other therapeutic substances to [p]repare eggs for incubation and minimize egg mortalities.

C3. Monitor and prepare eggs for transport to incubation facilities.

C4. Develop and submit reports on fecundity, egg survival and inventories to Supervisor.

C5. Responsible for implementing experimental design into spawning, hatching, and incubation activities to improve technology.

10% D. Plan, implement and direct woodworking, net building and automatic feeding systems construction projects.

(5%) D1. Direct construction and repair of fyke nets, seines and other specialized nets for monitoring and harvest of various life stages of cold and coolwater species.

D2. Direct the safe operation of woodworking equipment including table saw, radial arm saw, planer, sanders, drill presses and power nailers.

D3. Design and construct specialized or experimental equipment for developing new fish propagation technology.

D4. Design and construct all automatic feeder types including belt, blower and casting.

D5. Design, construct and maintain carpentry components of buildings, facilities and specialized equipment.

D7. Operate heavy equipment, emergency generators and light power equipment.

5% E. Provide information to hatchery visitors, provide technical support to other water team functions as required

E1. Conduct tours to school groups, clubs and other interested persons

E2. Provide information at job fairs, Sport Shows regarding fish propagation and other program functions.

E3. Attend training to enhance job skills and performance.

The record includes position summaries for several FT-Advanced level positions that reflect duties relating[2] to those performed by Steinke:

David Swansby, Wild Rose Hatchery

This position is a fish culturist working with the coldwater fish species at the Wild Rose Fish Hatchery. The responsibilities of this position require a basic knowledge of fisheries culture, fish diseases, environmental monitoring, of coldwater fish culture and may assist with coolwater propagation and spawning as assigned This position receives limited direction from the coldwater leadworker and directs the crew of two permanent employees and two LTEs while maintaining thirty ponds and twenty-two raceways.

[2] Information in the Proposed Decision relating to various other fish propagation positions has been revised to reflect the Commission's conclusion as to comparability.

Bruce J. Williams, Bayfield Fish Hatchery

This position functions as a member of the NOR Water Program Staff and works under the guidance of the Bayfield Hatchery Supervisor. The position functions as the lead worker at the Bayfield Fish Hatchery. Assigned duties include leadworker in the spawning, hatching, and rearing of 6-8 strains of wild salmonid fishes with yearly production numbering 750,000 to 1,500,000 fish. Other major duties include controlling diseases at the hatchery, distribution of fish, and operation of the Sewerage Treatment plant for the hatchery. The position is under close supervision of the hatchery supervisor and directs operations in the absence of the hatchery supervisor and foreman.

Gregory J. Durschba, Gov. Thompson Hatchery

This position functions as a member of the NOR Water Team as Musky/NP rearing Pond Manager. Coordinates pond production planning, conducting pond preparation, water control, water quality monitoring, pond aeration, zoo plankton production, disease treatment, predator control and feeding fingerlings. Directs forage crews and coordinates commercial forage deliveries. Directs rearing and harvest operations of musky and NP fingerlings. Acts as a Foreman to other FPT's and LTE's. This position requires advanced fish culture knowledge, organizational skills, effective leadworker and communication abilities. WI aquatic pesticide applicator's certificate is required.

Joseph Drabek, Jr., Gov. Thompson Hatchery

This position functions as a member of the NOR Water Team at the GTT Hatchery, performing spawning, rearing, harvesting, and distribution of cool water fishes. Foreman of a walleye harvest crew directing a walleye seining operation or a mini fyke net harvesting operation. This position has an assigned crew of fish propagation technicians and LTE's. Independently makes decisions on daily fingerling harvest and distribution. High level technical job requirements include advanced knowledge of fish propagation and leadworker techniques. Position requires limited supervision. Production facilities include 10 leased rearing ponds and 3 cooperative rearing ponds.

The position summary for the KMSFH Building #2 position occupied by Allen Nelson reads:

The focus of this position is a fish culturist at Kettle Moraine Springs, the sole wild steelhead production facility for Lake Michigan. The responsibilities of this position require a basic knowledge of fisheries culture, fish diseases, environmental monitoring, and written and oral communication skills. This position assists with production of fish and operation of a statewide fish propagation facility. Provide information and education to the public. May act as leadworker for LTE crews and permanent personnel. This position receives limited supervision.

Steinke does not spend a majority of his time performing "paraprofessional" work as that term is applied in the FT-Advanced specifications. His role in establishing the production goals for Lake Michigan's wild steelhead is to offer his opinion to Mr. Link as to the number of fish that can be propagated in the Building #1 system. He uses Building #1 and other components of KMSFH and works with the other staff to meet and implement those goals. He exercises his judgment in all aspects of fish propagation, including spawning, egg incubation, enumeration, health, water quality and food. He may act as a lead worker for some tasks but at any given time, three other positions at the facility, including the hatchery foreman, may lead his work.[3]

Other matters appear as contained in the Memorandum.

ORDER

Respondents' decision to deny Appellant's request to reclassify/reallocate his position to Fisheries Technician-Advanced, effective in September 2002, is affirmed and this matter is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 12th day of May, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

I dissent for the reasons expressed in the proposed decision.

Paul Gordon /s/
Paul Gordon, Commissioner

Parties:

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[3] Information in the Proposed Decision has been revised to reflect the Commission's conclusion as to the role of Appellant vis-à-vis the other four positions at KMSFH and KMSFN operation but not the entire facility.

Steinke vs. Department of Natural Resources and Office of State Employment Relations

MEMORANDUM ACCOMPANYING INTERIM DECISION AND ORDER

The procedural history of this dispute relates to the interplay of the following paragraphs in Sec. ER 3.01(2), Wis. Adm. Code:

> 'Reallocation' means the assignment of a position to a different class . . . based upon:
> (b) The creation of new classes;
> (c) The abolishment of existing classes;
> (e) The correction of an error in the previous assignment of a position.
> (f) A logical change in the duties and responsibilities of a position; . . .

Immediately prior to a classification survey that became effective on May 21, 2000, James Steinke worked in a position at the Kettle Moraine State Fish Hatchery that was classified as a Fisheries Technician 3. Upon the effective date of the survey, the Fisheries Technician 3 classification was abolished and two new classifications, FishTech and FT – Advanced, were created. Simultaneously, Respondent Department of Natural Resources exercised authority delegated by the Department of Employment Relations and reallocated Mr. Steinke's position to the new FishTech class as provided in Sec. ER 3.01(2)(b) and (c), Wis. Adm. Code. Mr. Steinke appealed the transaction in Case No. 00-0127-PC. He agreed to withdraw his appeal before the commencement of the scheduled hearing but made it clear that was doing so because he would be filing a new classification review request reflecting his continued belief that his position was more properly classified at the FT – Advanced level. He subsequently submitted a revised position description dated February 2001 to DNR but the initial draft went through numerous revisions before Steinke and DNR management reached a consensus version that was signed on September 9, 2002. The consensus document generated a formal classification review request by Steinke. Before DNR's human relation staff issued a formal decision on the request, Steinke filed a second appeal (Case No. 02-0052-PC which was subsequently redesignated No. 62753 by this Commission), contending that his request had been "constructively denied" by Respondents. DNR issued its adverse decision on the classification review by letter dated December 3, 2002, and Steinke filed a new appeal document on December 30, 2002, effectively amending his previous submission and placing the merits of the classification issue before the Commission. The parties later stipulated that the fundamental question was whether Steinke's position should have been reallocated to the FT – Advanced classification rather than FishTech.

Steinke contends that the initial survey decision was incorrect (i.e. he contends the position should have been reallocated to the FT – Advanced level as of May 21, 2000) and should be corrected pursuant to Sec. ER 3.01(2)(e), Wis. Adm. Code.[4] Tied to this theory is

[4] Appellant's theory of the case is set forth on pp. 12-13 of the hearing transcript.

the unstated contention that the position remained at the FT – Advanced level as of the effective date of classification review request that was the basis for the December 3, 2002 decision.[5] Nothing in the record of this matter suggests the September 9, 2002 position description did not accurately describe the duties assigned to the position in May 2000 as well as in September 2002. The Commission's analysis of the appeal is premised on the conclusion that there were no changes to Steinke's position between May 2000 and September 2002 that have any significance for classification purposes.

Effective date

As an attachment to their initial post-hearing brief dated May 28, 2004, Respondents submitted a partial copy of Chapter 332 of the Wisconsin Personnel Manual setting forth various policies and procedures relating to job classification, including the policy relating to the effective date of classification actions. The policy provides that regrades resulting from reallocation actions pursuant to Sec. ER 3.01(1)(e), (f) or (g), Wis. Adm. Code, are "effective at the beginning of the first pay period following effective receipt of the request." Although this document was not placed into the record during the course of the administrative hearing, Appellant did not object to its consideration in his reply brief or during subsequent oral argument. The Appellant has the burden of proof in this matter and his burden extends to the question of the appropriate effective date. He has failed to supply any evidence to the effect that the effective date assigned in this matter was inconsistent with Respondents' standard policy. The Commission has previously upheld the State's effective date policy as it applies to a reallocation/regrade due to the "correction of an error in the previous assignment of a position." UW & DER (FORREST-DESMITH), DECISION NO. 30769 (WERC, 1/16/04). There is no dispute that upon submission of the September 2002 position description, Respondents had "effective receipt" of all the materials necessary to constitute a reallocation request. However, there is no evidence that Steinke had submitted all necessary materials on some previous date. While Steinke argues that the effective date of his regrade should be February 15, 2001, when he submitted the initial version of a revised PD, it is unclear who received that PD and whether it was accompanied by any other materials. The fact that both Steinke and his supervisor signed off on the September 2002 PD suggests that all of the previous versions, including the February 2001 version, were incomplete. The parties agree that it was the September 2002 PD rather than the February 2001 document that the DNR classification specialist reviewed, generating the December 3, 2002 written decision that is the basis for the Commission's review. The parties do not dispute that the document was submitted immediately upon its completion on September 9th. The Commission determines that the effective date of the transaction is the beginning of the first pay period following September 9, 2002, given the absence of evidence establishing that there was "effective receipt" on a previous date.

[5] It would not make any sense to correct an error if the question had been made moot by changes subsequent to the effective date of the survey but prior to the effective date of the instant appeal. The Commission addresses the effective date question in a subsequent paragraph.

Proper classification level

Classification specifications are comparable to administrative standards. Their application to a particular position involves first determining the facts as to the position and then exercising judgment as to which classification best describes, encompasses or fits the position. Although that process involves some discretion when weighing factors against each other, it is essentially the application of a standard to a set of facts. DIVISION OF STATE PERSONNEL V. STATE PERS. COMM. (MARX), COURT OF APPEALS, DIST. IV, 84-1024, 11/21/85. The specification providing the "best fit" is used to determine the actual classification. The "best fit" is determined by the specification reflecting job duties and activities within which the employee routinely spends a majority of his or her time. DER & DP V. PC (DOLL), DANE COUNTY CIRCUIT COURT, 79-CV-3860, 9/21/80.

It is the Appellant who has the burden of proof and must establish by a preponderance of the evidence those facts necessary to show that Respondents' decision not to classify his position at the FT-Advanced level was in error. HARDER V. DNR & DER, CASE NO. 95-0181-PC (PERS. COMM. 8/5/96)

In light of the evidence of record and the language of the class specifications, Steinke has failed to establish that his collection of duties is better reflected by the Fisheries Technician-Advanced classification. The lower classification is appropriate because the technicians' responsibilities at KMSFH have been divided relatively equally between three positions that operate as a team and because the hatchery is also staffed by a technician foreman.

Respondents correctly note that their witness, Mr. Cornell Johnson, was the only expert Human Resources Specialist to testify, that his opinions were in support of the Respondent's decision, that he applied a correct methodology and that he drafted the FishTech and FT-Advanced classification specifications. Such testimony must be considered in the context of the entire analysis of the case as set out above and the testimony of an expert witness, although entitled to due weight, is not binding on the decision maker.

The language in the FishTech and FT-Advanced specifications seeks to establish a differentiation between the two levels. The Commission has carefully reviewed the specifications and has identified the following criteria or distinctions that are at least arguably relevant in terms of classifying hatchery positions.

Inclusions

FishTech refers to positions involved in a "variety of program support activities";

FT-Advanced is limited to technical paraprofessional positions that perform "a full range of fisheries management activities within fish production facilities or

basins";

Exclusions
FishTech excludes positions spending a majority of time engaged in technical paraprofessional fisheries management activities;
FT-Advanced excludes positions performing technical fisheries support activities;

Definition of terms
FT-Advanced requires paraprofessional work, i.e. "closely relating to and resembling professional" work, but not responsible for the "full range and scope of functions expected" of a professional;

Class definitions
FishTech positions involved in propagating activities "participate" in those activities and meet one of the allocations;
FT-Advanced positions are responsible for activities that: 1) are technical paraprofessional fisheries management activities; 2) have significant scope and impact; 3) fall within one of the three allocations listed; 4) are independently responsible for 5) the design and implementation of 6) fisheries management projects; and 7) the activities are performed with significant delegation.

In summary, hatchery positions at the FT-Advanced level have a broader scope and impact, operate with significant independence/delegation, perform technical activities that are not focused on program support, and perform a "full range of fisheries management activities within fish production facilities" (though not the "full range and scope of functions expected of a professional position.")

Some of the more tangible distinctions drawn by the two specifications in terms of hatchery positions can be extracted from the first two representative positions for each level:

Crew Leader [FishTech] - Perform work in warm/cool/cold water fish propagation to include spawning, forage, rearing, harvesting, distribution, net and seine repair and construction. Serve as crew chief during spawning and forage operations with responsibility for assigned personnel and equipment; train and instruct Limited Term Employees and permanent staff in methods, procedures and aspects of warm/cool/cold water fish propagation.

Propagation Technician [FishTech] - Perform technical propagation operations including egg incubation, disease control, water level control, water quality monitoring, detailed record keeping, and outlying forage collection for hatchery

productions. Monitor and observe the condition of eggs, fry and water quality and make needed corrections and adjustments when necessary.

Pond/Rearing Station Foreman [FT-Advanced] – As the Pond/Rearing station Foreman, oversee and provide direction for all aspects of fish rearing and harvest operations at a warm/cool/cold water fish production facility. Propose renovation projects for the facility. Conduct administrative duties and tasks as assigned by the hatchery supervisor or regional operations coordinator.

Hatchery Foreman, Governor Thompson Hatchery Spooner [FT-Advanced] – Oversee a computer operated water supply, well water, water filtration, degassing, egg incubation, rearing pond aeration and wastewater discharge system. Coordinate and oversee the daily operation of all coldwater fish egg incubation, fry and fingerling distribution and compile all data necessary to generate hatchery production reports. Audit and participate in all phases of operational planning to insure that statewide fish production goals are met. This position requires WPDES wastewater certification.

One characteristic that is made clear by the representative positions is that a fish propagation technician in a hatchery with lead work responsibilities can be assigned to either the FishTech or FT-Advanced class level.

Both of the FT-Advanced representative hatchery positions are identified as foremen, and both are assigned a range of independent responsibilities that extend beyond those assigned to Mr. Steinke, whose responsibilities focus on one of the four species of steelhead raised at KMSFH and reflect the existence of a hatchery foreman for the facility. In contrast, the Pond/Rearing Station Foreman is responsible for *all* aspects of the operations at the facility as well as for administrative duties assigned by the hatchery supervisor or regional coordinator. The representative position for Hatchery Foreman is responsible for *all* coldwater fish production at the facility and the scope of his operational planning tasks is likewise broader than Steinke's. Appellant's spawning work falls within the scope of the Crew Leader representative position at the FishTech level. His other duties relating to fish propagation fit well within the FishTech "Propagation Technician" representative position, encompassing various technical operations, recordkeeping, monitoring conditions and making "corrections and adjustments when necessary."

These distinctions between the representative hatchery positions at the two class levels meld with several of the factors identified in the list drawn from the exclusion statements and the classification definitions, such as range, scope, independence and a focus on management rather than support. Based on this review of the closest representative positions and of other portions of the classification specifications, Mr. Steinke's position does not reach the FT-Advanced level.

The Commission would not feel bound by this conclusion if Mr. Steinke's position

satisfied the hatchery-specific allocation at the FT-Advanced level. That allocation describes positions that "have a major role in developing the annual production plan for a fish production

facility and have specific independent responsibilities for carrying out that plan, including prepare ponds or other raceways for production; prepare fertilizing and forage schedules; sample and monitor fish for health, growth and condition factors; sample and monitor ponds for water quality, fertility, abundance of zoo plankton and forage minnows; maintain statistical data; and generate production reports."

Respondents argue that Mr. Steinke fails to have a "major role in developing the annual production plan for a fish production facility and have specific independent responsibilities for carrying out that plan." Respondent contends that the reference to "a fish production facility" in this allocation is to an entire facility rather than only one building in a hatchery that includes four major buildings. Respondents' interpretation of the clause is not unreasonable and it is consistent with other language in the specifications that suggest a FT-Advanced position should have greater range and scope. It is also consistent with the higher level of independence that should be part of FT-Advanced position, a level that is belied by the relatively high level of sharing of staff supplies and equipment that exists for the four buildings at KMSFH. Steinke's contention that the Building #1 system is a "fish production facility" as that phrase is used in allocation (1) of the FT-Advanced definition would suggest that any technician with responsibility for rearing fish in a definable component or structure of a hatchery would satisfy the requirement. Such a reading could encourage hatcheries to organize staff predominately for classification reasons rather than for reasons of fish propagation. Because Steinke's responsibilities are focused on one of the four primary buildings at KMSFH, his position fails to satisfy allocation (1) at the FT-Advanced level.[6]

The result reached by the Commission in this matter is consistent with that in HOFFMAN V. DNR & DER, CASE NO. 00-0133-PC (PERS. COMM. 5/17/01), a case that addressed the distinctions between the classifications of Wildlife Technician and Wildlife Technician-Advanced. Respondents summarized that comparison as follows:

> The three employees assigned to each hatchery building at the Kettle Moraine Springs Hatchery work as a team, each with their own role and specialization. In HOFFMAN, it was found that Advanced classification was not appropriate for the Wildlife Technician positions because the [three] technicians operated as a team, so that no technician's individual contributions had significant impact on the program. Instead, "the highest level duties are being

[6] Steinke's role in setting production levels at the hatchery is described in the following testimony by Mr. Link:

> . . . I'm going to turn around and go to my technicians – Mr. Steinke being one of them – and I'm going to say, "Okay, Jim, the Skamania are normally in your building, this is how many we're asked to rear. Can you do that in your building?" And then at the same time, I'm going to involve the other technicians, "If Jim can't do it, is there anyway we can bend our production rule to be – or program to be able o afford to do that?" (Transcript, page 147)

> divided up" and the Personnel Commission concluded that if employees were given credit for shared duties, "these duties could be divided up between 37 technicians and all could still qualify for the Advanced level classification," which it declined to do. (Citations omitted.)

Even though the wildlife technicians were seeking classification at the Advanced level based on an allocation other than the one that is the focus of the present case,[7] the underlying premise is still the same because the higher level duties were split up between each of three technicians who nevertheless spent a very significant amount of their time performing lower level duties or being directed in their work by each other.

Position-to-position comparisons also can play an important role in reaching a conclusion on a classification question. The best comparisons for assessing the proper classification of Mr. Steinke's position are to his two co-workers at KMSFH, Hron and Nelson. Both of these two positions were reallocated to the FishTech level. As noted in HOFFMAN V. DNR & DER, CASE NO. 00-0133-PC (PERS. COMM. 5/17/01), such comparisons to immediate co-workers

> are certainly important in analyzing the correctness of the respondents' decision to reallocate the appellant's position, they are not determinative. Comparison to a position of a co-worker who declined to appeal a reallocation decision should not serve as the sole basis for deciding the proper classification of the appellants. (citations omitted)

The Commission has taken notice of the fact that Mr. Nelson was contesting his classification level at the time of the hearing in this matter. Nevertheless, the classification levels of both the Nelson and Hron positions provide significant support for continuing to classify Mr. Steinke's position at the FishTech level.[8] Hron was presumably a relatively new employee but was still

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[7] While the Commission has focused on FT-Advanced allocation (1), the Appellant has not limited his argument to that particular allocation. Where he suggests that he satisfies allocation (2) or (3), the result reached in HOFFMAN is even more compelling. In addition, the language of allocations (2) and (3) is not descriptive of Appellant's responsibilities. His work is not tied to a particular basin or basins as referenced in allocation (2) and as described in the "Upper Wisconsin Basin Technician" representative position. He also does not have the responsibility to develop, design and implement fisheries management projects as referenced in allocation (3) and described in the "Treaty Assessment Technician" representative position. Mr. Steinke's duties are focused on the annual operating cycle for certain aspects of a fish hatchery rather than on independent projects.

[8] Mr. Link testified that Mr. Nelson functioned as a FT-Advanced but that Mr. Hron needed to gain "a little more experience" before he would be performing at that level. (Tr., p. 168) Respondents have correctly noted that the FishTech and FT-Advanced classifications do not comprise a progression series, i.e. a classification structure where employees are hired to fill a position at a lower class level and, with the passage of time or with some training, are expected to be performing in the same position at a higher classification level. The fact that Mr. Link acknowledged Mr. Hron was not performing at the FT-Advanced level tends to undermine Mr. Steinke's claim.

at the same class level as Steinke. Hron, once past probation , should be operating at same capacity as Steinke. Nevertheless, Hron clearly does not have the independence that is contemplated at the Advanced level.

Other fish propagation positions of record carry out duties that are in many ways similar to those assigned to Mr. Steinke. However, each can be distinguished in one or more important ways. Bruce Williams' position at the Bayfield Fish Hatchery reflects a number of similarities to Appellant's position, especially because the position summary indicates the Bayfield facility has both a supervisor and a foreman. Yet the position summary also indicates that the Williams position "functions as **the** lead worker" at the hatchery and those duties extend to "6-8 strains of wild salmonid fishes with yearly production numbering 750,000 to 1,500,000 fish" as well as to operating the hatchery's sewage treatment plant. The Swansby position at Wild Rose Fish Hatchery leads the work of two permanent employees as well as two limited term employees. The Gregory Drushba position at the Governor Thompson Hatchery is clearly identified as a foreman position as is the Joseph Drabek position.

Appellant has the burden of showing that the Respondents' decision was incorrect and that his position is better described at the FT-Advanced level. Mr. Steinke has not sustained his burden.

Dated at Madison, Wisconsin this 12th day of May, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

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