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ROBERT VON RUDEN, William F.
 Leisso, Edward M. Biddick, Richard C.
 Wendt, James Voborsky, Donald R.
 Beaty, Allen C. Beyer, George E.
 Rock, and John E. Berggren,

Appellants,

v.

Secretary, DEPARTMENT OF
 EMPLOYMENT RELATIONS,

Respondent.

Case Nos. 91-0149, 0155, 0156,
 0164, 0166, 0167, 0172,
 0175, 0178-PC

* * * * *

INTERIM
 DECISION
 AND
 ORDER*

These are consolidated appeals pursuant to §230.44(1)(b), stats., of reallocations. Appellants' positions were reallocated to Civil Engineer - Transportation Supervisor 3 (Supervisor 3) and they contend respondent Department of Employment Relations (DER) should have reallocated them to Civil Engineer - Transportation Supervisor 4 (Supervisor 4).

Appellants occupy positions functioning as area maintenance unit supervisors in various transportation districts throughout the state. The Civil Engineer - Transportation Supervisor series classification specification (Respondent's Exhibit 1) includes the following definitions and work examples for the Supervisor 3 and Supervisor 4 classifications:

CIVIL ENGINEER - TRANSPORTATION SUPERVISOR 3

Positions at this level perform professional supervisory work in the field of civil engineering transportation. Positions allocated to this

* Since these cases have been proceeding on a consolidated basis, not all the cases are being decided the same way, the prevailing appellants have the opportunity to request costs pursuant to §227.485, Stats., and in the interest of avoiding possible piecemeal litigation, this ruling is being issued as an interim decision only as to all cases. It is anticipated that once any petition for costs is resolved, a final decision will be entered as to all cases.

class directly supervise a medium to large unit (more than 6 FTE) of professional journey level civil engineers in transportation OR the positions supervise staff as described in level 1 or 2 and perform advanced 1 civil engineering work in transportation.

EXAMPLES OF WORK:

Positions allocated to this level function as first-line or unit supervisors in construction, design, traffic, maintenance and planning in the districts and function as unit supervisors in the central office. Typical duties of these positions in the districts include: supervise and direct engineers and technicians in carrying out work such as design project development, construction project management, traffic program, maintenance program and planning activities; assist the district section chiefs in carrying out the program of the section; provide guidance and coordination for consultant contracts. In the central office the duties include: supervise journey level civil engineers or advanced specialists in the development of policies and procedures for the design, construction, maintenance or operation of transportation facilities.

Positions assigned to this level may also supervise units as described in level 1 or 2 provided that the civil engineering work completed by the supervisor is work normally completed as a civil engineer - transportation - advanced 1.

CIVIL ENGINEER - TRANSPORTATION SUPERVISOR 4

Positions at this level perform professional supervisory work in the field of civil engineering in transportation. Positions allocated to this class directly supervise: (1) a small to medium unit (1 to 10 FTE) of senior or advanced civil engineers in transportation OR (2) perform advanced 2 civil engineering work and supervise a staff as described in level 1, 2, or 3.

EXAMPLES OF WORK:

Typically positions assigned to this level supervise a large number of subunits, such as design squads or construction projects with the majority of these projects being the more complex projects. Duties include the supervision and direction of senior or advanced level civil engineers who also direct the work of others. Positions at this level may supervise staff in the development of policies and procedures for the design, construction, maintenance or operation of transportation facilities. Positions with this focus, however, directly supervise civil engineers who are at the advanced 1 level.

The primary issues in this case are whether appellants' positions satisfy either the first Supervisor 4 allocation (supervision of one to ten FTE (full time

equivalent) senior or advanced level civil engineers) or the second allocation (perform Civil Engineer - Transportation Advanced 2 level work and supervise staff as identified at the Supervisor 1, 2 or 3 levels).

In response to respondent's written interrogatories inquiring as to which allocation patterns the appellants contended their positions satisfied, appellants Beaty, Biddick, Leisso, Voborsky and Von Ruden identified the first allocation (based on supervision of civil engineers), while appellants Berggren, Beyer, Rock and Wendt identified the second allocation (based on performing advanced 2 level work). In post-hearing briefing, appellants' attorney argues that they should not be bound by these answers.

The Commission by rule, §PC 4.03, Wis. Admin. Code, has provided for parties to "obtain discovery ... as provided by ch. 804, Stats." Section 804.08(2)(a), stats., provides that "[i]nterrogatories may relate to any matter which can be inquired into under §804.01(2), and the answers may be used to the extent permitted by chs. 901-911." These answers to respondent's interrogatories are obviously relevant and non-privileged, and the Commission does not agree they should not be considered as effectively controlling appellants' litigation posture. Appellants' counsel makes four arguments in support of his contention, which the commission will address seriatim.

Appellants first contend that:

The Department should be basing its decision on the record in its entirety. The Answers to Interrogatories are intended to be factual questions and not legal conclusions. To the extent that the State is focusing only on the requested legal conclusion in the Interrogatories as opposed to the facts, it is inappropriate to restrict the appellants to questions related to conclusions of law. Therefore, there is nothing in the Answers to Interrogatories in which the appellants should be precluded from maintaining either of the allocation patterns.

The Commission cannot agree that the answer to the interrogatory question "which of the two allocation patterns for Civil Engineer - Transportation Supervisor 4 do you contend your position meets" calls for a legal conclusion. Further, §804.08(2)(b), stats., provides that "[a]n interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact."

Appellants also contend that these cases were heard on a consolidated basis, and the record considered as a whole establishes "the qualification of each of the appellants under both allocations without regard to their answers to Interrogatories." Assuming for the sake of argument the accuracy of appellants' characterization of the record, it does not follow that the answers to the interrogatories should be brushed aside. Appellants have cited no authority for the proposition that answers to interrogatories of this nature are not binding if it turns out they are inconsistent with other evidence of record. It is appropriate to use interrogatories to narrow the issues for hearing. See e.g., Alta Health Strategies, Inc. v. Kennedy, 790 F. Supp. 1085, 1100 (D. Utah 1992) ("Generally, interrogatories requiring legal or factual conclusions are to be answered 'when they would serve a substantial purpose in expediting the lawsuit, leading to evidence, or narrowing the issues.'" (citation omitted)); U.S. v. Article of Drug, etc., 43 F.R.D. 181, 189 (D. Del. 1967) ("It is well settled that Rule 33 interrogatories are to facilitate trial preparation, to narrow issues, and to reduce the chances of surprise."). The Supervisor 4 classification has two, conceptually different, allocations. Respondent had a right to use interrogatories as part of its prehearing preparation to ascertain which of these allocations appellants claimed. Appellants' current posture would render meaningless this accepted and beneficial use of interrogatories. Furthermore, this is not a case where appellants simply answered erroneously with respect to a specific factual matter which turned out to be incorrect in light of the evidence produced at hearing. Rather, the interrogatory in question addressed a major issue of litigation strategy -- which of two conceptually different allocation patterns would be pursued -- and respondent certainly had the right to rely on those answers.

Appellants also contend that holding them to their answers "flies in the face of the liberal pleading rules in Wisconsin." However, an answer to an interrogatory is not a pleading. Even approaching this issue from the broader notion that administrative procedures are generally less rigid than judicial procedures, in these cases appellants have made no showing as to why they responded to the interrogatories in the manner they did. Again, they cite no authority for the proposition that a party should be excused from its answers simply because they turn out to be inconsistent with the hearing evidence.

Appellants also argue that what amounts to a retraction of their answers should not be considered prejudicial to respondent because (due to logistical reasons) the hearing wound up taking place on several days spread out over a number of months. However, based on how the hearing proceeded, respondent never had reason to believe that appellants would not be held to their answers to the interrogatory in question. Furthermore, even assuming for the sake of argument an absence of prejudice to respondent, this would be at best only one potential factor to be considered in determining what effect to give to appellants' answers to this interrogatory. As discussed above, respondent had a right to ask these questions and to rely on the answers.

Finally, appellants argue that if they were held to their answer, this would lead to unfair and unreasonable results, since only some of the appellants would qualify for the Supervisor 4 level, while they contend that all are similarly situated. Again, assuming arguendo the factual premise of this argument, any perceived unfairness or irrationality is simply a result of how appellants chose to answer this interrogatory question. What we have here is a situation where in preparation for hearing, respondent propounded interrogatories to appellants, through their counsel, seeking to determine, among other things, which of two Supervisor 4 allocations each of the nine appellants claimed their positions met. Appellants could have identified either allocation or both, or objected to the interrogatory if there were a ground for that. However, five identified the first allocation and four the second. It was only after hearing was underway was there any indication that appellants wanted to "shift gears" with respect to their approach to these allocations. Appellants have not come forward with any reasons either why the initial answers did not reflect their subsequent position, or why this issue was not raised until well after the commencement of the hearing. Therefore, appellants will be held to their answers to this interrogatory.

BERGGREN, BEYER, ROCK and WENDT

These appellants identified the second allocation, which is based on the performance of Advanced 2 level work, as the allocation which their positions meet. For the reasons discussed above, this is the only allocation the Commission will address with respect to these appellants.

The Civil Engineer Transportation Series classification specification (Respondent's Exhibit 2) includes the following definition of the Advanced 2 level:

This is advanced level 2 civil engineering work in such areas as planning, design, construction, maintenance, traffic, materials and/or operation of highways, structures, and other transportation facilities for which the department may be responsible. Positions allocated to this class perform the most technically complex project management engineering assignments involving policy, standards, and procedure development, evaluation, budget and administration.

Employees at this level function as the chief technical consultant to lower level engineers, engineer supervisors, and engineer managers. Work is performed under the general policy direction of an engineer manager with authority to make statewide decisions on major technical/professional matters.

Appellants testified about various advanced level work they perform. However, the Advanced 1 level classification also refers to advanced level work, as well as to work which "requires a high level of interpretation and creativity and has major impact on the planning, design, construction, maintenance and operation of transportation facilities." In order to qualify for the Advanced 2 level, positions must satisfy the following criteria:

- (1) [P]erform the most technically complex project management engineering assignments involving policy, standards, and procedure development, evaluation, budget and administration.
- (2) [F]unction as the chief technical consultant to lower level engineers, engineer supervisors, and engineer managers.
- (3) Work is performed under the general policy direction of an engineer manager with authority to make statewide decisions on major technical/professional matters. (emphasis added)

The record does not establish that appellants satisfy any of these criteria.

To begin with the third criterion, it is undisputed that appellants' supervisors do not have the "authority to make statewide decisions on major technical/professional matters."¹ The record clearly reflects that statewide

¹ In Jones v. DER, 91-0145-PC (11/13/92), the Commission rejected DER's contention that this criterion should be interpreted as applicable to the subordinate rather than the supervisor. In any event, even if the latter interpretation were to be utilized, it also is clear that appellants themselves do not have the "authority to make statewide decisions on major technical/professional matters."

decisions of this nature are made in the central office. While many employees in the districts have input into statewide policies through serving on committees or forwarding ideas to Madison, this falls short of having the authority to make statewide policy decisions of this nature. As the Commission observed in Jones v. DER, 91-0145-PC (11/13/92):

The appellant's responsibilities for "policy, standards, and procedure development" are no different than the responsibilities given to representatives from each of the other 7 highway districts in the state. While there was testimony that DOT subscribes to the "group development concept" so that new policies are typically developed with input from the user population, that does not mean that the responsibility for developing new policies rests someplace other than in the central office.

Even when appellants develop new methods or policies on their own, these are forwarded to Madison where they must be approved before implementation as statewide policies.

Appellants also do not satisfy the first Advanced 2 level criterion of "performing the most technically complex project management engineering assignments." (emphasis added) Appellants are area maintenance supervisors within districts. There are two or more area maintenance supervisors within each district in question. There is nothing in this record to establish that appellants perform the most technically complex assignments even within their districts.

For somewhat similar reasons, appellants do not satisfy the second Advanced 2 level criterion of functioning as a chief technical consultant. While they do consult with other engineers, supervisors and managers about many matters, the other area maintenance supervisors also are performing this role, and there is nothing in the record to support a conclusion that appellants are the chief technical consultants.

BEATY, BIDDICK, LEISSO, VOBORSKY, VON RUDEN

These appellants' claims rely on the first, or "supervisory" supervisor 4 allocation -- supervision of one to ten senior or advanced civil engineers. Appellants do not have engineers assigned to their continuous supervision for twelve months of the year. However, the districts in question have engineering "pools" whose members are assigned to various units in the

district -- design construction, maintenance, etc. -- depending on workload and project requirements. These assignments vary in frequency and duration.

Respondent rejected the Supervisor 4 classification for these appellants on the basis of the conclusion that their supervision of pool engineers when they were assigned to maintenance was of a "temporary" nature, and therefore appellants could not be considered "true" supervisors of these engineers. At least part of respondent's basis for this conclusion was based on the printed material in box 13 of the position description, which refers to the supervision of "subordinate employes in permanent positions." (emphasis added). However this term is a means of distinguishing permanent positions from project or limited term positions, and does not imply that there has to 100%, year-round supervision of the subordinate position to qualify the incumbent as a supervisor.

The factual basis for respondent's conclusion was based primarily on documentary evidence which did not identify appellants as "official" supervisors of the pool engineers. For example, Richard Walsh, who is the District 5 (LaCrosse) Chief of Administrative and Management Services (which includes the district personnel function) searched some district records at the request of DOT personnel in Madison, and his response included the following:

In our files we have Supervisory Analysis forms as follows.

Donald Beaty dated 2/87
Edward Biddick dated 4/83
Robert Vonruden dated 3/87
Non available for William Leisso.
None of these forms list any engineers either by class or name in item #7.

I have also reviewed the time sheets for all of 1990 for the engineers mentioned in your memo.² None of the time sheets for 1990 were signed by Beaty, Biddick, Leisso or Vonruden.

I've reviewed performance evaluation forms on file here and am unable to locate any that were signed by Beaty, Biddick, Leisso or Vonruden for the period prior to the survey for the named engineers. (memo dated 8/27/93, Respondent's Exhibit 33)

² These were the engineers appellants in their answers to interrogatories claimed to have supervised.

Respondent also relied heavily on information found on PD's. For example, the DER personnel expert testified as follows as to the significance of the entry on civil engineer Fries' PD of Mr. Mouchka's name as the first line supervisor.

A Well, it indicates who the supervisor of record was for Mr. Fries, who his actual supervisor was, at the time time at least that they signed the PD.

Q And to the extent that the appellants here ... had contended that they were the supervisor of, for example Mr. Fries, what if any bearing would this particular document have on that ...?

A This would tell me that that was not true, that Mr. Mouchka was the supervisor -- that Mr. Fries was permanently assigned to Mr. Mouchka.

Q For purposes of classifying a position under a class spec like we have here ... What effect would a position description like this have when you have the assertion by a particular appellant that he supervises them?

A That it was not a permanent assignment but a temporary assignment.

Q What would be the consequence of a nonpermanent or temporary supervisor of a position when you're trying to determine what is the appropriate or proper class level for the position.

A O.k. We can only give one supervisor credit for an employe. We can't cut the employe up and give several supervisors credit

The only witnesses with material first hand knowledge of what actually has been occurring in the districts in question were the appellants themselves and Mr. Walsh, who has been in his position for many years. Their essentially uncontradicted testimony was that there were engineers assigned from time to time to the appellants from among the group of positions designated "pool" positions, that this occurred on an ongoing and continuous, albeit somewhat unpredictable basis, and that when this did occur the appellants carried out essentially the same supervisory authority as did their counterparts in the design and construction sections -- i.e., handling grievances, approving time off, completing performance evaluation forms, etc.³ Mr. Walsh testified as follows on cross examination:

³ Mr. Walsh testified with respect to his August 27, 1993, memo to DOT personnel (Respondent's Exhibit 33), concerning certain district personnel records, that he had been unable to find any supervisory analysis forms for the period preceding the survey implementation date for anyone in the district, not just for appellants. He also testified that prior to the survey, very little attention had been paid to these documents, and that it was more the exception than the rule that these forms were accurate.

Q Now in fact, is it true Mr. Walsh that what these appellants do with respect to supervision is no different than what persons classified as supervisor 4's do with respect to engineers, isn't that right?

A I can detect no appreciable difference in day to day management of those units.

* * *

Q Is it your testimony Mr. Walsh, and your observation back in 1990 and true to the present date, that there's no significant qualified difference between what those now classified as supervisor 4's do with respect to engineers and what these appellants do?

A None at all.

In addition to Mr. Walsh's testimony on this issue, Mr. Biddick testified that he had worked in both maintenance and construction, and that there was no difference between the sections in the nature of supervision of pool engineers. Mr. Walsh also testified that in his opinion there was no reason why appellants' positions should not be classified at the Supervisor 4 level.

Also supporting appellants' case is the fact that in 1993⁴ management solicited affidavits from the appellants in District 5 for use in FLSA litigation in federal court which identified them as supervisors of civil engineers for the purpose of addressing the accuracy of those civil engineers' PD's. (See, e.g., Appellants' Exhibit 27). Mr. Walsh testified about this as follows:

Q In fact was Mr. Von Ruden the only appellant in the room who was asked to sign affidavit?

A No, if they had people in these classifications, included in the SEA [State Engineers Association], each one of them would have been asked to sign one for those people that were reporting to them.

Q Now in fact, with respect to these affidavits, in your experience, were more than one person was asked to sign the affidavit for an individual engineer?

A Yes, it happened throughout each of the operating sections in the district, that an employe may work for as many four different supervisors in that one year's time frame.

This evidence adds further support to appellants' contention that they should be considered supervisors of the pool engineers, just as their counterparts in other sections have been.

Based on this record it must be concluded that when the pool engineer positions are assigned to appellants' units, appellants supervise them in the same way that the Supervisor 4's do, when those engineer positions are

⁴ Although this occurred after the reallocation, evidence that the nature of the supervisory relationships in question had not changed over the intervening period provides a foundation of relevance.

assigned, for example, to the design or construction sections. Furthermore, on this record it must be concluded that these assignments to the maintenance section are no more "temporary" than assignments of the pool engineer positions to any other section.

With respect to the classification of appellants' positions, the Commission concludes that they should be at the Supervisor 4 level. On the basis particularly of Mr. Walsh's testimony, the preponderance of the evidence is that appellants have the same kind of supervisory relationship to the pool engineer positions as do the other Supervisor 4's who supervise these pool positions. Under these circumstances, there is no sufficient reason for appellants' positions to be in a different classification.

The Commission also notes that the Civil Engineer - Transportation Supervisor classification specification (Respondent's Exhibit 1) by its terms covers only positions which are supervisory as defined by §111.81(19), stats., which provides:

(19) "Supervisor" means any individual whose principal work is different from that of the individual's subordinates and who has authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline employes, or to adjust their grievances, or to authoritatively recommend such action, if the individual's exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Again, appellants meet this definition to the same extent as their counterpart Supervisor 4's. While appellants' comparability to these other positions is a sufficient basis for the conclusion that the Supervisor 4 level is appropriate for appellants' positions, the administrative case law developed under §111.81(19), stats., or the nearly identical provision in MERA (§111.70(1)(o)), also supports this conclusion.

To the extent that respondent's case is based on an absence of documentary evidence demonstrating appellants' supervisory relationship vis-a-vis the pool engineer positions, this is not determinative under §111.70(1)(o), stats., see, e.g., School District of Glenwood City, Dec. No. 20949-A (WERC 6/20/88) ("Job descriptions may well be helpful in the determination of employment duties. Of greater weight in determining supervisory status, however, are the actual duties performed.") Related to this is the principle that it is the delegation of supervisory authority, not the exercise of it, that is more significant in determining supervisory status. See Jackson County, Dec.

No. 17828-A (WERC 10/27/83). To the extent it can be argued that appellants are not in a position to exercise their supervisory authority year around, this is no less true of the other supervisors who rely on the supervision of pool positions for the Supervisor 4 level. There also is apparently nothing in the §111.81(19) definition of "supervisor" or in the interpretations thereof that requires that an employe must have this authority at all times in order to be considered a supervisor.

In conclusion, respondent's position on this issue has relied primarily on documentary evidence provided to, and through, DOT personnel. At the de novo hearing before the Commission, the evidence established that for certain reasons, perhaps only some of which appear on this record, these documents did not fully and accurately reflect the actual arrangements in the districts. Respondent's conclusion, drawn from these documents, that appellants' supervision of civil engineers was "temporary" in nature and not consistent with the §111.81(19), stats., definition of "supervisor" is untenable in the context of the record evidence and must be rejected.

ORDER

1. With respect to Case Nos. 91-0149-PC (Von Ruden), 91-0155-PC (Leisso), 91-0156-PC (Biddick), 91-0166-PC (Voborsky), and 91-0167-PC (Beaty), respondent's actions reallocating these positions to Supervisor 3 rather than Supervisor 4 are rejected, and these matters are remanded for action in accordance with this decision.

2. With respect to Case Nos. 91-0164-PC (Wendt), 91-0172-PC (Beyer), 91-0175-PC (Rock) and 91-0178-PC (Berggren), respondent's actions reallocating these positions to Supervisor 3 rather than Supervisor 4 are affirmed, and these appeals are dismissed.⁵

Dated: August 31, 1995

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

AJT:jan


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

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⁵ Respondent's notice to strike appellants' objections to the proposed decision and order on the grounds of late filing is denied as moot, since the parties' positions on the matters raised therein were discussed at length in oral argument before the Commission.