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RICHARD D. FEENEY,

Appellant,

v.

Secretary, DEPARTMENT OF
EMPLOYMENT RELATIONS,

Respondent.

Case No. 92-0025-PC

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INTERIM
DECISION
AND
ORDER

This case involves an appeal pursuant to s. 230.44(1)(b), Stats., of the reallocation of appellant's position from Engineering Technician 5 (ET 5) to Engineering Specialist - Transportation - Senior (ES-Sr.) rather than Engineering Specialist - Transportation - Advanced 1 (ES-Adv. 1).

Appellant has been employed for many years in Transportation district 6 (Eau Claire). He denies that his position description (PD) at the time of the survey implementation (Respondent's Exhibit 2) was completely accurate, but it serves as at least a basic outline of appellant's position.¹ The "position summary" includes the following: "Under general supervision of the District Design Supervisor responsible as project technician for the development of plans and specifications for large design projects." Goal A, which is 80% of the position, is "Design Project Technician in the development of contract plans and large projects." The worker activities under this goal are as follows:

- A.1 Prepare preliminary engineering studies, Environmental Impact Statements, Request for Exceptions and Design Study Reports for various types of streets and highways.
- A.2 Coordinate project development with local and governmental agencies. Prepare and submit required requests for necessary permits or agency coordination.
- A.3 Prepare exhibits and cost estimates for alternative designs for public information meetings and public hearings.

¹ Additions to and clarifications of this PD in the context of the subsequently-developed ES Classification Specification will be discussed below.

- A.4 Determine and coordinate field surveys necessary for design of the project plan, including such aerial photography and planimetric mapping as is necessary.
- A.5 Develop for approval, basic horizontal and vertical alignments and typical cross sections using COGO, Roadway Design, Hydraulics and other engineering computer programs.
- A.6 Prepare for approval, preliminary plan after gathering and analyzing traffic projections, accident data, maintenance and personal field reviews, survey information, soils investigations, and pavement design.
- A.7 Provide utility companies with detailed information to allow them to relocate or revise their facilities.
- A.8 Determine and coordinate soils and materials investigations required in the design of the project.
- A.9 Complete and assemble final design of contract plan, including geometric computation, hydraulic computations, and quantity computations.
- A.10 Direct and train employees assisting in the development of contract plans and right-of-way plats. Coordinate with CADDS unit for final drafting of plan.
- A.11 Write contract specifications and prepare contract documents necessary for bid letting.
- A.12 Prepare for approval Erosion Control Plans and Traffic Control Plans for safety and efficient handling of traffic during construction.
- A.13 Prepare PS&E contract documents including Engineer Estimate, Special Provisions, Non-Standard Bid Items, Plan letter, Time Analysis, Sample Proposal, and List of Supplemental Specifications.
- A.14 Coordinate with State Historical Society, DNR, and U.S. Corps of Engineers.
- A.15 Respond to inquiries from contractors, abutting land owners, general public, central office plan checkers, construction project engineers and local officials.

This PD also has goals of 5% for "development of right-of-way plats for highway improvements," 5% for assisting design squad leaders in reviewing and monitoring plans prepared by consultants, and 5% for serving as the district photography consultant.

The ES class specification includes the following definitions, and the more relevant representative positions, for ES - Sr. and ES-Adv. 1:

ENGINEERING SPECIALIST - SENIOR

Positions allocated to this class perform complex engineering specialist assignments under the general supervision of a higher level engineering specialist, architect/engineer, engineering specialist supervisor, or architect/engineer supervisor.

Examples of typical duties of Engineering Specialists at the Senior level are listed below:

DISTRICT - DIVISION OF HIGHWAYS AND TRANSPORTATION SERVICES

Design

Design Squad Leader

At this level, the position directs assigned personnel in completing studies, reports, plans, documentation, plans and specifications necessary for the planning, location, design and construction of highway improvement projects. The position directs one or more lower level specialists or technicians in the design activities for assigned projects. The projects at this level are medium to large projects and include reconditioning road projects with minimum to no right-of-way purchases with possibly the paving of shoulders and intersections. The large projects are usually less urban, may have environmental issues but have little controversy, and may involve a lot of grading and the alteration of an existing road. Employee may also review and coordinate consultant-prepared plans or outside agency plans of comparable size. Employee may act as assistant design squad leader for large to reasonably complex road projects.

* * *

ENGINEERING SPECIALIST - ADVANCED 1

Positions allocated to this class perform very complex assignments under the general supervision of an architect/engineer, engineering specialist supervisor, or architect/engineer supervisor.

Examples of typical duties of Engineering Specialists at the Advanced level are listed below:

District

* * *

Design

Design Squad Leader

This is the advanced level of design squad leaders. At this level, the position directs lower level specialists, technicians, and entry and developmental engineers in completing studies, reports, plans, documentation, plans and specifications necessary for the planning, location, design and construction of large to complex highway improvement projects. This position is assigned from 1 - 3 projects to be designed simultaneously. This position coordinates and oversees all design alternatives, computations, and final plans, specifications, and estimates. Typical complex projects are politically sensitive; may be a new location; involve right-of-way, traffic control and utility issues; have considerable public involvement. Positions at this level may coordinate and review large to complex projects designed by consultants. (Respondent's Exhibit 1)

The only difference between the ES - Sr. and ES - Adv. 1 definitions is that the former uses the terminology "perform complex engineering specialist assignments" (emphasis added), while the latter uses the terminology "perform very complex assignments" (emphasis added). The ES class specification does not define the difference between "complex" and "very complex."

The material representative positions at the ES - Sr. and ES - Adv. 1 level are differentiated primarily on the basis of the nature of the projects for which they are responsible. Both direct other employees in the execution of projects. The ES - Sr. is involved with "medium to large" (emphasis added) projects which "include reconditioning road projects with minimum to no right-of-way purchases with possibly the paving of shoulders and intersections. The large projects are usually less urban, may have environmental issues but have little controversy, and may involve a lot of grading and the alteration of an existing road." The ES - Adv. 1 is involved with "large to complex" (emphasis added) projects. Typical complex projects are characterized as "politically sensitive; may be a new location, involves right of way, traffic control and utility issues; have considerable public involvement."

Against this backdrop, this case presents three major issues:

- 1) Was appellant's position that of a "design squad leader" as this term is used in the list of ES - Adv. 1 representative positions, or a comparable type of ES - Adv. 1 position?

2) What is the meaning of the term "large to complex highway improvement projects" in the description of the ES - Adv. 1 design squad leader representative position?

3) Did the majority of appellant's duties and responsibilities prior to the reallocation involve responsibility for projects which satisfy the "large to complex" criterion?

In addressing the first issue, there are certain factors which must be kept in mind. First, as the ES class specification clearly states, the representative positions are not part of the class definitions but are "examples of typical duties of Engineering Specialists" (emphasis added) at the particular level. Second, District 6 was organized in a rather unique way among the districts.

When DER reallocated appellant's position to the ES - Sr. level (versus ES - Adv. 1) it relied on the recommendation of appellant's supervisor as to the level of work he was performing in the context of the ES class specification. Appellant contends that this supervisor, who had only supervised appellant for a few months prior to the reallocation, was not in the best posture to have evaluated the level of his work.² Appellant relied to a large extent on the testimony of a former colleague (Lewis Kohn) who for many years had worked relatively closely with appellant in a quasi-supervisory capacity prior to his (Kohn's) retirement.

Kohn, a Civil Engineer-Transportation-4 (CE4) testified that District 6 operated somewhat differently than the other transportation districts in the state. According to Kohn, the district utilized four engineers (CE3's or 4's) as design squad leaders. They were assigned highway projects by upper-level management. Kohn was responsible for from 20-25 projects at a time. Kohn in turn decided by whom the projects were to be executed from a design standpoint. Kohn testified that when he assigned projects to appellant, the appellant would get any help he needed from other ET's, limited term employees (LTE's), engineering students, and sometimes from employees involved primarily in construction, when the latter were available. Appellant would be

² Implicit in appellant's approach here also is the contention that the supervisor's testimony that appellant lacked lead work responsibilities as a design squad leader was based on an overly narrow interpretation of the class specification, as will be discussed below.

in charge of directing the work of these employees, and would be responsible for the assigned project generally, subject to Kohn's general oversight and responsibility.³ Kohn testified that when appellant received projects, they usually were in a preliminary stage, but this was not always the case.⁴

On this record, it appears to the Commission that appellant was in effect and functionally acting in a capacity that should be considered equivalent for classification purposes to that of a design squad leader. Because in District 6, civil engineers were called squad leaders, it meant that they were at least nominally responsible for certain activities that might be performed in another district by an ES - Adv. 1 squad leader. However, the actual direction of the design squads in District 6 was that of positions such as appellant's. This of course is consistent with Mr. Kohn's testimony. It also is corroborated by the fact that the typical ES - Adv. 1 specialist design squad leader was "assigned from 1-3 projects to be designed simultaneously," (ES class specification, Respondent's Exhibit 1, p. 17), while Kohn testified that he was assigned 20-25 projects simultaneously. He obviously could not handle these singlehandedly, and he assigned specific responsibility for particular projects to lower level employees. Another factor corroborating this conclusion is that respondent apparently has had no difficulty characterizing appellant as a design squad leader at the ES - Sr. level⁵, notwithstanding the at least nominal designation of CE3's and 4's as design squad leaders in District 6.

Related to the foregoing is respondent's contention that lead work responsibilities are required for classification at the ES-Adv. 1 level, and since appellant did not have specific employees reporting to him in a lead work capacity, he did not satisfy this criterion. While the ET 6 composite (Appellant's Exhibit 6) that was developed during the survey does utilize the term "leadworker" in the "position summary," the ES class specification does not make this a criterion for the ES-Adv. 1 classification. As discussed above, the ES-Adv. 1 definition merely states that these '[p]ositions ... perform very

³ Kohn was not appellant's supervisor per se, as both reported to Larry Hyland, CE5 Supervisor.

⁴ An example was the Highway 10 project (Appellant's Exhibit 24), which had been about 25% completed by another employee (Ed Solin) when he retired, and the project then was assigned to appellant.

⁵ As discussed above, the primary distinction between the ES - Sr. and ES - Adv. 1 squad leaders for classification purposes are the nature of the projects for which they are responsible.

complex assignments under ... general supervision." (Respondent's Exhibit 1). The design squad leader example at this level states the position directs employes in completing studies, reports, plans, etc., "necessary for the planning, location, design and construction of large to complex highway improvement projects." Id. Mr. Kohn testified that when he assigned appellant projects, appellant would need additional help at various stages of the projects, and various technicians and other employes would be assigned to help him. Mr. Kohn, also testified that appellant would have primary responsibility for the development of the project and the direction of the employes assigned to assist him. Thus, while appellant may not have been considered by his supervisor to have been a leadworker in the strict sense of the term, in the Commission's opinion, his functional role and activities were consistent with what was intended for classification at the ES-Adv. 1 level.

In short, since appellant's position has effective responsibility for the core duties and responsibilities of a design squad leader, he should not be denied reclassification because of the unique upper level organizational structure of District 6, which resulted in a small number of engineers being designated as squad leaders, but then parceling out the work among appellant and other employes to actually effectuate the completion of the specific projects assigned to them.

Having concluded that appellant's position should be considered a design squad leader or its equivalent for classification purposes, the next question to be addressed is the meaning of "large to complex" projects as this term is used in the ES-Adv. 1 design squad leader representative position. This issue engendered much debate in the course of this proceeding. Respondent's view on this can be summarized by some excerpts from the hearing testimony of respondent's expert witness on this issue:

It means ... that a project is going to encompass some of both ... It means that you're going to leave parts of both -- maybe the dollar amount falls into the large but you have an extreme environmental issue. Ok. Maybe there's not very many contract items, but it's in an urban area, you know, there's combinations, there's attributes of both ... it has elements of both large and complex ... you would have attributes from both. It would be and, it would be part large and part complex, it would be large to complex.

Utilizing DER's definition, it appears that appellant satisfies the "large to complex" criteria. Illumination of the terms "large" and "complex" is provided by two documents in this record.

The ES-Sr. representative design squad leader description in the ES class specification includes the following:

The projects as this level are medium to large projects and include reconditioning road projects with minimum to no right-of-way purchases with possibly the paving of shoulders and intersections. The large projects are usually less urban, may have environmental issues, but have little controversy, and may involve a lot of grading and the alteration of an existing road. (Respondent's Exhibit 1, p. 10.)

The ES-Adv. 1 representative design squad leader description in the ES class specification includes the following:

Typical complex projects are politically sensitive; may be a new location; involve right of way, traffic control and utility issues; have considerable public involvement. Id., p. 17.

In addition to the aforesaid descriptive language, there is another document in the record developed by DOT and entitled "CE Specifications - Definitions of types of projects." (Appellant's Exhibit 21.)⁶ The distinctions between "large" and "complex" projects are set forth as follows:

Large Roadway Projects:
grading and paving of 1 mile or more state highway
has detours and bridges
minimal complexity
minimal involvement with utilities, traffic control and public relations
has erosion controls
cost of \$500,000 to \$2 million
100-200 contract items
reconditioning of roadway w/substantial grading and
moving/removing part
has environmental issues

* * *

Complex Roadway Projects:
200+ contract items
maybe existing or new roadway
involves serious environmental issues
substantial public involvement (public relations)
politically sensitive
involves right of way issues
multi-stage
involves many contractors
typically urban
involves different types of pavement
includes retaining wall & bridges
has large volume of traffic

⁶ While the lineage of this document is uncertain, both parties relied on it.

involves complex engineering principles
substantial traffic control
may be freeway construction

Many of the distinctions between these kinds of projects (large and complex) involve general, relativistic terms which can best be analyzed by a professional with experience in the field in question. For example, what is the difference between "minimal complexity" (large) and "involves complex engineering principles" (complex); "environmental issues" (large) and "serious environmental issues" (complex). Other criteria appear to be more readily quantifiable -- e.g., "100-200 contract items" (large) and "200+ contract items" (complex).

In attempting to sustain his burden of proof, appellant relied primarily on four projects with which he was involved during about a two year period prior to the reallocation. They will be referred to as follows:

HWY 10	01/88 - 10/88	Appellant's Exhibit 24
HWY 73	10/88 - 02/90	Appellants' Exhibit 26
HWY 72	02/90 - 06/90	Appellant's Exhibit 22
HWY 12	early '90 - 06/90	Appellant's Exhibit 25

Mr. Kohn testified that in his opinion, both the HWY 10 (Appellant's Exhibit 24) and the HWY 22 (Appellant's Exhibit 22) projects were very complex. As to the latter, he testified extensively about the engineering complexities associated with the project, including rough terrain, grade lines requiring more extreme cuts and fills, the need to acquire right of way, etc. He also testified extensively about HWY 10 (Appellant's Exhibit 24), including such factors as moving from an existing to a new road alignment through wetlands, right of way acquisition, heavy grading, significant water issues, etc.

As to HWY 73 (Appellant's Exhibit 26), Mr. Kohn did not testify that this was a complex project overall, but the record established that it was large - - approximately \$3.5 million, 24.9 miles, and about 150 contract items. Also, it had some complex elements -- right of way acquisition and complicated water issues. Thus, this project falls into the "large to complex category."

It is undisputed that from June 17, 1988, through June 17, 1990, appellant actually worked 3585 hours. It is also undisputed that appellant spent the following actual work hours on the projects discussed above:

HWY 10 (Appellant's Exhibit 24):	458 hours
HWY 22 (Appellant's Exhibit 22):	419 hours

HWY 73 (Appellant's Exhibit 26): 1374 hours

2251 hours

Thus, 62.79% of appellant's time during this two year period preceding the survey reallocation was involved in working on "large to complex" projects.

Respondent argued that because appellant was not responsible for all these projects from start to finish, but in some cases only completed a certain percentage of the whole, his responsibility was diminished below what is necessary for the ES-Adv. 1 classification. As Mr. Kohn testified, it obviously would be necessary to complete a project when, for example, an employee retired, by assigning it to another employee. Under such circumstances, the number of hours appellant spent working on such projects was no less time spent on "large to complex" projects than those hours he may have spent on a project for which he had start to finish responsibility. This conclusion might be different if appellant regularly had been assigned to perform only specific parts or kinds of work on large to complex projects, but this was not the case.

ORDER

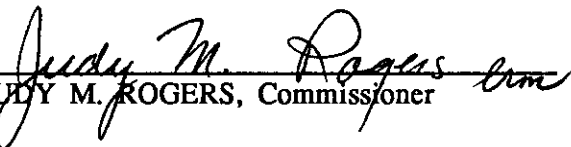
For the foregoing reasons, the Commission concludes that respondent erred in reallocating appellant's position to ES-Sr. rather than ES-Adv. 1, and this action is rejected and remanded to respondent for action in accordance with this decision.

Dated: June 13, 1996 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

AJT:pf


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

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NOTICE
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

Petition for Rehearing. Any person aggrieved by a final order (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must

serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.)

2/3/95