

STATE OF WISCONSIN

PERSONNEL COMMISSION

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DAVID L. MISTEREK, *

Appellant, *

v. *

Secretary, DEPARTMENT OF
EMPLOYMENT RELATIONS, *

Respondent. *

Case No. 92-0511-PC *

* * * * *

DECISION
AND
ORDER

This matter is before the Commission after a hearing, held on a consolidated basis with Hein v. DER, 92-0583-PC, on the following issue:

Whether respondent's decision reallocating appellants' positions to Waste Management Specialist-Senior rather than Waste Management-Advanced was correct.

Appellant has the burden of proof to show, by a preponderance of the evidence that respondent's decision to reallocate his position to the Waste Management Specialist-Senior (hereafter referred to as WMS-Senior) classification was incorrect. Appellant failed to sustain his burden.

The appellant serves as a solid waste specialist in the Lake Michigan District of the Department of Natural Resources. He is one of approximately 17 waste management specialists who are assigned to specific geographic components of the state. His responsibilities include a portion of the Oshkosh Area within the Lake Michigan District, including Winnebago, Outagamie, Waupaca and Waushara counties. He is one of three solid waste specialists in the district. The others are Carl Roovers in the Green Bay office and Stan Nigalski in the Marinette office. During the time period relevant to the reallocation decision, the appellant's duties were accurately described in a position description signed in May and June of 1994, which includes the following goals and worker activities:

- 10% A. Investigation of solid waste facilities and assurance of compliance with state regulations.
- 10% B. Implementation of a technical assistance program to persons involved in solid waste management.

- 10% C. Review applications, initial site reports, feasibility reports, plans of operation, plan modifications, construction documentations, infield conditions reports, environmental monitoring plans, and other engineering plans for new and existing solid waste facilities.
- 5% D. Review of Waste Management Fund and Long Term Care Programs.
- 25% E. Implementation of the Solid Waste Management program for those facilities considered to be more complex. Advanced technology distinguishes these facilities from the more common facility of this type in the state. Examples of these complex facilities are the Winnebago County Landfill, the Outagamie County Landfill and the Wisconsin Tissue Mills Landfill.

* * *

- E-2 Implementation of a technical assistance program for these facilities geared to their site specific advanced design, construction and operation. Technical assistance in areas of advanced technology has lead to the development of districtwide and statewide expertise in specific technical areas such as multiple liners for landfills, alternate daily covers ("Sani-Foam", "Concover"), advanced final landfill cap vegetation (prairie, wildlifeneesting cover), methane gas control and recovery, stabilization of papermill sludge, municipal refuse incineration with heat recovery, municipal ash disposal, infectious waste disposal, advanced recycling technology and disaster debris disposal.

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- E-5 Review industrial and special waste disposal approvals to insure compliance with solid and hazardous waste regulations and the approved engineering plans for the facility.
- 20% F. Administrative activities in the area office.

* * *

- F-6 Participate in the development, implementation, monitoring and evaluation of district and statewide policies, administrative codes and programs. Examples include: industrial sludge management code revisions, municipal waste incinerator ash guidelines, medical/infectious waste guidelines.

recycling grants code development and organizational workload analysis. These responsibilities have significant programwide policy impact.

- F-7 Participate in the development of national solid waste policies through involvement in organizations such as "The Association of State and Territorial Solid Waste Management Officials (ASTSWMO).
- F-8 Participate in the final review committee for statewide recycling demonstration grants.
- 10% G. Education and training activities.
- 10% H. Participation in special activities as requested by the District Unit Leader, District Program Supervisor, District Director, Bureau Section Chief, Bureau Director or Department Secretary.
 - H-1 Develop, implement, monitor and evaluate special projects such as site assessment surveys, program guidelines, policy development and abandoned landfill inventories. Also participate in special statewide projects such as the Little Lake Butte des Morts Sediment Remediation (sic) Team.
 - H-2 Provide direct assistance in emergency spill response and natural disaster response through the Office of Emergency Government. Assist local agencies regarding leaking underground storage tanks, abandoned containers and other environmental emergencies involving solid waste or hazardous materials. This includes spill response, field investigation and technical assistance in providing for safe and legal storage and disposal of spilled materials, contaminated soils and disaster debris.
 - H-3 Provide training for new area office solid waste program staff.
 - H-4 Serve as the resource person to area, district and bureau staff regarding solid waste issues.
 - H-5 Provide administrative assistance to area office as requested by the office manager.

The WMS specifications include the following language:

WASTE MANAGEMENT SPECIALIST, SENIOR

.... Positions at this level have extensive authority in carrying out their assigned responsibilities. This involves independently implementing the assigned duties and having developed an expertise in the field. The work performed at this level requires a high degree of interpretation and creativity in exercising independent scientific judgment. The Waste Management Specialist at this level may be considered an expert in a segment of the program. Positions at this level typical function as: (1) a senior area/district waste management specialist responsible for developing, administering and evaluating the waste management program in the assigned geographic area/area of expertise; or (2) a senior district waste management specialist responsible for developing, administering and evaluating a major portion of the waste management program being implemented districtwide....

WASTE MANAGEMENT SPECIALIST, ADVANCED

.... Positions typically serve as the (1) department or systemwide expert for a significant segment of the waste management program or (2) a districtwide expert with multi-faceted responsibilities (providing district wide expertise and coordination for multiple and significant segments of the waste management program). The areas of responsibility will normally cross program boundaries, require continually high level and complex contacts with a wide variety of government entities, business, industry, and private citizens regarding highly sensitive and complex waste management issues and have significant program wide policy impact. The area of expertise will represent an important aspect of the program, involve a significant portion of the position's time and require continuing expertise.... These positions are responsible for developing, implementing, monitoring and evaluating statewide policies and programs and function under general supervision, work independently, and are considered to be the statewide expert in their assigned program area. In order to be designated at this level, the position must be easily distinguishable from positions at the senior level by the scope and complexity of the responsibilities.

The appellant's position fits within the parameters of the WMS-Senior allocation for "(1) a senior area/district waste management specialist responsible for developing, administering and evaluating the waste management program in the assigned geographic area/area of expertise." It is arguable whether the level of his work exceeds the WMS-Senior definition in terms of its scope and complexity, but even if appellant's position were to appear to be at a higher level in certain respects, it cannot be classified at the WMS-Advanced level unless it meets all the requirements for that

classification found in the specifications. The WMS-Advanced definition includes the following requirement: "These positions are responsible for developing, implementing, monitoring and evaluating statewide policies and programs and function under general supervision, work independently, and are considered to be the statewide expert in their assigned program area." The Commission has consistently interpreted this language, as found in this and various related classifications, as a requirement for classification at the Advanced level. Fitzgerald v. DER, 92-0308-PC, 1/11/94; Edwards v. DER, 92-0423-PC, 11/29/93; Koch v. DER, 92-0555-PC, 8/22/94; Rasman v. DER, 92-0435-PC, 6/21/94; Hutchison v. DER, 92-0577-PC, 10/24/94, petition for rehearing denied, 12/13/94. The conclusion that this language represents a classification requirement, instead of serving merely as one of many factors in determining the "best fit" for a position, is reinforced by comparing another portion of the WMS-Advanced classification: "The areas of responsibility will *normally* cross program boundaries...."

The record establishes that the appellant has gained experience arising from his work with certain new technology and emergency situations. Appellant described some of these areas as follows:

- Alternate daily cover for landfills - This position has issued the first approval of the use of "Sanifoam" as daily cover for a municipal landfill. The development of the use of "sanifoam" in Wisconsin was initiated at the Outagamie County Landfill. It was the first chemical foam used as daily cover in the state. During its development, testing and final approval, this position served as the statewide expert and provided technical assistance to other facilities in Wisconsin and the Nation in the effectiveness of its [sic] use.
- Advanced final landfill cap vegetation - This position was instrumental in initiating the use of prairie vegetation and wildlife nesting vegetation as final landfill cap vegetation in the state. The technique has been used in several facilities in the Oshkosh Area which serve as models for similar use in other facilities statewide.
- Methane gas recovery - This position was largely responsible for the field investigation, evaluation and technical assistance for the first two large scale municipal landfill methane gas recovery projects undertaken in Wisconsin. [As] such, the position served as statewide expert to other facilities, consultants and Department personnel interested in the developing technology.

- Disaster debris disposal - This expertise initiated with an emergency response to a tornado which devastated the City of Wautoma in 1992. In responding to the need for immediate debris disposal in the devastated area, a disposal facility was approved for emergency use on state owned land near the city. The coordination of the approval, siting [sic], operation and closure of this facility was assigned to this position. In fulfilling the responsibilities, this position has become the statewide expert in this field; and expertise that has expanded to the environmental emergencies resulting from the debris produced during the floods of 1993. Slide presentations on this subject were given by this position to various statewide groups including the Department's Bureau of Solid and Hazardous Waste and the Wisconsin Counties Association. The expertise has also been used by this position to assist in the development of national guidelines for the management of disaster debris during the annual meeting of "The Association of State and Territorial Solid Waste Management Officials (ASTSWMO) in Tampa, Florida. (App. Exh. 43, p. 11)

The expertise described by the appellant has been developed as a consequence of particular problems and proposals which have arisen within his assigned geographic area. If similar problems or proposals arise in another DNR district, there is no evidence that the appellant is assigned the responsibility to review the required reports and plans or to respond to the natural disaster in that other district. This responsibility would remain with personnel in that district. The appellant's knowledge may be more developed on certain topics than the other 16 waste management specialists in the state, but the record does not support the conclusion that he has statewide responsibility for those topics or for the assigned program area.

Activity F-6 refers to appellant's work as a member of various committees. Appellant further explained this activity as follows:

Development of these policies, administrative codes and programs usually involve working in a committee whose duties include developing the policies, codes or programs; implementing them either through the program administration or through the DNR Board and Legislative process; monitoring and evaluating them through observation of public or employee reaction and revising them as necessary to achieve a workable and successful policy, code or program. (App. Exh. 43, p. 10)

In Rasman, supra, the Commission concluded that having some input into statewide policies as a member of a committee falls well short of being

"responsible for developing, implementing, monitoring and evaluating statewide policies and programs and... considered to be the statewide expert in their assigned program area."

It is unnecessary to reach the appellant's contention that respondent is improperly interpreting the word "significant" to mean greater than 50% in the following phrase in the WRS-Advanced specification: "The area of expertise will... involve a significant portion of the position's time...."

Appellant also argues that he was denied "equal rights" by respondent's failure to appear at a prehearing conference and by respondent's failure to meet with the appellant prior to the hearing, as requested by the hearing examiner, in an effort to narrow the scope of the case at hearing. Even though it may have been helpful to the appellant if the respondent had participated in these two procedures, respondent's failure to participate did not prejudice the appellant's case and is not a basis for ruling in appellant's favor in this matter.

Because the appellant is not considered the statewide expert in his assigned program area, the respondent's reallocation decision must be upheld.

ORDER

The respondent's reallocation decision is affirmed and this appeal is dismissed.

Dated: April 17, 1995

STATE PERSONNEL COMMISSION


LAURIE R. MCCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

KMS:kms
K:D:Merits-reall (Mistereck)

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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