

\* \* \* \* \*

JAMES MORRISSEY,  
 HAROLD MEIER,  
 THOMAS A. LOVEJOY,  
  
                   Appellants,  
  
 v.  
  
 Secretary, DEPARTMENT OF  
 EMPLOYMENT RELATIONS,  
  
                   Respondent.  
  
 Case Nos. 92-0525, 0559-PC  
  
 \* \* \* \* \*

RULING  
 ON MOTIONS  
 FOR  
 SUMMARY JUDGMENT

On December 16, 1993, the respondent filed Motions for Summary Judgment in the above matters. The parties filed written materials relating to the motion. Based upon the documents and arguments filed by the parties, it appears the respondent is not entitled to judgment as a matter of law, and the motion must be denied.

FINDINGS OF FACT

1. As a result of a personnel management survey conducted by respondent, the appellants' positions were reallocated to the classification of Environmental Analysis and Review Supervisor (EAR Sup.) effective April 19, 1992. The appellants contend that their positions are more appropriately classified at the Environmental Analysis and Review Manager (EAR Mgr.) level.
2. The position summary on the appellant Lovejoy's position description which he signed on or about March 31, 1993, and which he states reflects his duties for the period including April of 1992, reads as follows:

This position manages the Environmental Analysis and Review program in the 14-county Western District. The position is responsible for assisting in the development of statewide program purposes, mission, goals, policies and objectives, and insuring that these statewide purposes, etc. are carried out in Western District. A major part of this responsibility is to manage review of a diverse variety of department and non-department proposed actions to determine potential environmental consequences and significance, creating opportunities for public input and assur-

ing decisions which reflect wise use and/or protection of environmental resources.

This position is supervised by the District Director or Deputy District Director. The position is delegated authority to certify department compliance with the Wisconsin Environmental Policy Act and manage district reviews and position development for Federal Energy Regulatory Commission (FERC) hydropower and Wisconsin Department of Transportation (DOT) projects (also Minnesota DOT projects on common boundary Mississippi and St. Croix rivers). The ERS also manages or serves as department or district coordinator as directed by the District Director's office on complex, multi-disciplinary projects and federal/state liaison actions.

This position is largely unique in the district in that the duties routinely require the ERS to have substantial knowledge of an interaction with many other subprograms to effectively implement Environmental Analysis and Review program duties. The position also requires extensive coordination/cooperation with various local, state, and federal units of government, local planning agencies, professional consultants, and the general public. The work delegated to this position requires substantial independent judgement and is performed under very general supervision. The ERS has to rely on many people at different professional levels and with varying skills/abilities for review and input. Since the ERS has no supervisory responsibility for most of these people, effective interpersonal skills are essential to accomplishing most work activities.

The ERS directly supervises two environmental analysis and review specialist positions which are located at Area offices (La Crosse and Eau Claire).

This position description was also signed by appellant's supervisor.

3. Appellant Meier has similar responsibilities but works in DNR's Southern District.

4. Appellant Morrissey has similar responsibilities but works in DNR's Southeast District.

5. Both the EAR Sup. and EAR Mgr. specifications include the following identical language:

Purpose of This Classification Specification

.... Positions allocated to this classification provide scientific and supervisory expertise in environmental analysis and review for all department programs. This classification specification will

not specifically identify every eventuality or combination of duties and responsibilities of positions that currently exist, or those that result from changing program emphasis in the future. Rather, it is designed to serve as a framework for classification decision-making in this occupational area.

### Inclusions

This classification encompasses non-represented supervisory positions, found in the central, district, or field offices of the Department of Natural Resources....

The Department of Natural Resources' Environmental Analysis and Review program coordinates the Department's review, under the Wisconsin Environmental Policy Act, of potentially major public and private proposals.

The review work includes: analyzing applications of federal hydropower licenses and proposing appropriate permit terms and conditions; reviewing the Department of Transportation's construction projects and negotiating construction safeguards or project revisions to accomplish project objectives while protecting environmental interests; managing the overall review of major regulatory projects and analysis of environmental issues; and preparing and coordinating environmental impact statements and holding public hearings on major public or private proposals requiring the Department of Natural Resources' approval.

6. The EAR Sup. specifications also include the following language:

### DEFINITIONS

Under the general supervision of a higher level administrative supervisor, positions at this level typically function as: (1) a district or regional environmental analysis and review supervisor, or (2) a unit leader in the central office.

Duties include: effectively recommending the hiring, transfer, suspension, layoff, recall, promotion, discharge, assignment, evaluation, discipline, and adjustment of grievances of subordinate employees; supervising, coordinating, and reviewing the work of professional environmental analysis and review specialists and others to assure conformance with established policy, procedures, and standards; planning and conducting training and orientation for environmental analysis and review specialists, related technical employees and others, and instructing/training them in the appropriate methods of environmental analysis and review techniques; directing the preparation of materials for presentation to the appropriate department, state,

or local personnel for further follow-up, analysis or remedial action; analyzing environmental analysis and review and related programs and assisting in the development and implementation of improved environmental analysis and review related analyses, evaluation, and regulatory techniques and procedures; recommending needed changes to applicable laws, rules, regulations, polices [sic.], and procedures to higher level supervisors and program administrators; participating in or responsible for the performance of special project activities relating to the development of new environmental analysis and review regulations and/or the revisions of existing ones; giving expert testimony in court; maintaining liaison and working contacts with federal, state, and local natural resources [sic.], environmental and/or other environmental analysis and review and related agencies, other regulatory agencies, and other pertinent persons and/or organizations; coordinating joint environmental analysis and review investigations or related activities as required with other agencies or regulatory bodies; and conducting informational activities relative to the interpretation and application of the Objectives [sic.] and requirements of environmental analysis and review and related programs. General supervision is received from higher-level supervisors or managers.

#### Representative Position

District Environmental Analysis and Review Supervisor - Position is responsible for the coordination of interdisciplinary district reviews and investigations as related to environmental analysis and review; develops and implements long-range and annual work plans; evaluates and monitors work plans accomplishments; prepares and monitors program budgets; and supervises subordinate professional staff.

7. The EAR Mgr. specifications also include the following language:

#### Inclusions

\* \* \*

Positions allocated to this classification are primarily responsible for program policy development, strategic planning, and implementation.

Per Wis. Stats., sec. 111.81(13), "'Management' includes those personnel engaged predominately in executive and managerial functions, including such officials as division administrators, bureau directors, institutional heads, and employes exercising similar functions and responsibilities as determined by the [Wisconsin Employment Relations] Commission." The position will participate in the formulation, determination, and imple

mentation of management policy and establishing an original budget or the allocation of funds for differing program purposes.

\* \* \*

#### DEFINITIONS

Under the general supervision of a higher level administrative supervisor, positions at this level typically function as an environmental analysis and review section chief. Work at this level is distinguished from that at the supervisory level in that positions have management responsibility for all components of the environmental analysis and review program, including planning, coordinating, and guiding field personnel on environmental analysis and review program planning; or maintaining liaisons with district(s) and/or other management and staff in the central office to assure that the environmental analysis and review program is carried out in a uniform manner and meets the standards and goals of the program statewide; assuring that environmental analysis and review functions are met and carried out in an appropriate manner; recommending improvements in the program and overseeing the budget for all subprogram components.

#### Representative Position

Section Chief, EIS Development - Directs the statewide program for the development of Environmental Impact Statements; develops and reviews legislation, administrative rules, policies and procedures; develops Department standards and implementation procedures for managing major project and issue reviews for preparing, circulating and reviewing Environmental Assessments and Environmental Impact Statements; develops work and long-range plans; manages section budgets and supervises section personnel.

#### DISCUSSION

In order to grant the respondent's motion for summary judgment, the Commission must conclude that there is no genuine issue as to any material fact and that the respondent is entitled to judgment as a matter of law. In the discussion below, references are to appellant Lovejoy, although, as noted above, the other two appellants perform substantially similar responsibilities.

The appellant's position has the working title of Western District Environmental Impact Coordinator. He supervises two positions located in area offices. The appellant acknowledges that his position "is listed as a representative position in the Supervisor classification" and acknowledges that his

position is not described as the one representative position (Section Chief, EIS Development) set forth at the EAR Manager classification, or as what the definition statement describes as the sole "typical" allocation at that level, "environmental analysis and review section chief." The appellant contends, however, that his responsibilities fall within the definition of "management" as set forth in the EAR Manager classification, that he meets the remaining descriptive language of the EAR Manager definition, and that his position therefore exceeds the requirements for the EAR Supervisor classification.

In order for a position to be properly classified at the EAR Manager level, it must meet the definition of the term "management" as set forth in finding 8, above.<sup>1</sup> The appellant contends that the management activities he performs are "directly comparable to those of other District Program Managers (i.e., Water Regulation & Zoning, Forestry, Fisheries, Wildlife, Water Resources, Water Supply, etc.)" as well as to central office section chiefs.<sup>2</sup> (Brief, p. 3) Appellant supports this contention with various memos. (Attachments 3 and 5 to his answers to respondent's interrogatories)

The primary distinction between the Supervisory and Manager classification is that mere supervisors are described at the EAR Sup. level while management employees are described at the Manager level. For purposes of ruling on the respondent's motion for summary judgment, the Commission must accept as true the appellant's contention that he has the same management responsibilities as various other district positions which are classified as managers (and, therefore, meet the definition of "management.") This contention, if established at hearing, could justify the classification of the appellant's po-

---

<sup>1</sup>The Commission has held that its authority to review reallocation decisions includes the authority to determine which of two classification levels best describes a position, where the key distinction between the class levels is whether or not the position meets the statutory definition of "management." Paynter v. DER, 93-0120-PC, 12/13/93

<sup>2</sup>The Commission recognizes that the class specifications for the Water Regulation and Zoning Manager classification or the Forestry Manager class may have different allocation patterns, and different representative positions than the EAR Manager specifications. However, the key is the statutory definition of management and a comparison of the appellant's responsibilities, in terms of that definition, to those district program managers who have apparently been found to meet the definition of management.

sition at the EAR Manager level, as long as the appellant's position is not excluded by other language in the Manager specifications.<sup>3</sup>

While the respondent contends that there are other requirements for classification at the Manager level that the appellant does not meet, there are too many questions which exist to deny appellant, who is appearing *pro se*, the opportunity for hearing.

Respondent contends that statewide responsibility is an absolute requirement for the Manager level and that appellant does not have such responsibility. Respondent suggests that statewide responsibility is implicit in the language of the Inclusions section of the Manager specifications (which states that "Positions allocated to this classification are primarily responsible for program policy development, strategic planning, and implementation."<sup>4</sup>)

---

<sup>3</sup>Respondent also contends that the reference in §111.81(13), Stats., to positions "engaged predominately in executive and managerial functions" was further defined by the Wisconsin Employment Relations Commission in WSAA & State of Wis., Case 33, No. 16403 SE-65, Decision No. 11640-C (1986) as "being equivalent to majority." Respondent's brief, page 3. A review of the decision in that case indicates that the WERC did not adopt a definition of "predominately." The WERC was considering a petition by the Wisconsin State Attorneys Association to clarify the state-wide Legal bargaining unit. In concluding that all but one of the positions were included in the bargaining unit, the WERC wrote:

While all the attorneys spend some time participating in the making of various policy decisions, we are not persuaded that this is the function in which they are "engaged predominantly" within the meaning of Sec. 111.81(13), Stats. Instead, their predominant functions and responsibilities as indicated by their position descriptions and their testimony are to provide legal services and legal advice to their client. While we recognize that legal advice can at times involve recommendations regarding the policy issues and among policy choices that are confronted, it is legal advice rather than policy making that constitutes the functions in which the occupants of the disputed positions are predominantly engaged. (footnote omitted)

<sup>4</sup>Respondent also suggests that the appellant fails to meet the requirement of being "primarily" responsible for policy development, planning and implementation. Appellant contends that he spends some time on policy development and strategic planning and a great deal of time on implementation. In the context of this motion for summary judgment, complainant's contention is sufficient to propel this matter to the hearing stage.

and that this reading is supported by language in the Definition section of the specifications.

The language in the definition can be broken down into numbered clauses, as follows:

Work at this level is distinguished from that at the supervisory level in that [1] positions have management responsibility for all components of the environmental analysis and review program, including planning, coordinating, and guiding field personnel on environmental analysis and review program planning; or [2] maintaining liaisons with district(s) and/or other management and staff in the central office to assure that the environmental analysis and review program is carried out in a uniform manner and meets the standards and goals of the program statewide; [3] assuring that environmental analysis and review functions are met and carried out in an appropriate manner; [4] recommending improvements in the program and overseeing the budget for all subprogram components.

While there are arguments supporting various interpretations of these phrases in terms of whether they are requirements in the alternative or must be met in each instance, the conjunction "or" between phrases [1] and [2] indicate that they exist in the alternative, and the absence of any conjunction before [3] and [4] indicate that they must always apply.

The only reference in this definition statement to "statewide" is found in phrase [2]. Even if that phrase is read to require statewide program responsibility, a position which fulfills phrases [1], [3] and [4] would still meet the requirements of the definition.

Respondent also suggests that statewide responsibility is implicit in language of the Inclusions section of the EAR Manager specifications stating that "Positions allocated to this classification are primarily responsible for program policy development, strategic planning, and implementation." There is substantially identical language in the Water Regulation and Zoning Manager (WRZ Mgr.) Inclusions section.<sup>5</sup> However, the definition statement in the WRZ Mgr. specifications identifies positions functioning as *district* water regulation and zoning program managers as well as water regulation and zoning section chiefs. The position of District Water Regulation and Zoning

---

<sup>5</sup>"Positions allocated to this classification are primarily responsible for program policy development; strategic planning; and implementation, budgeting, monitoring and workload management."



Manager is also identified as a representative position in the WRZ Mgr. specifications. Because the WRZ Mgr. and EAR Mgr. specifications have similar language in the Inclusions section, and because the WRZ Mgr. classification clearly includes positions found in the district, the Commission declines to interpret the Inclusions section of the EAR Mgr. specifications as excluding district positions.

It is also noteworthy that appellants claim they have comparable statewide managerial responsibility as the Section Chief positions which have been allocated to the EAR Mgr. level. According to Appellant Meier's answer to respondent's interrogatories:

Management, procedural and policy issues are all addressed through "team management". The Section Chief attends the same team management meetings with the EAR Coordinator and together we reach agreement on proposals for legislative initiatives, administrative rules, policies and procedures, strategic plans, long-range plans, procedures for managing major projects and EA and EIS preparation and development.

The Bureau Director is usually present at these meetings and oversees the discussions as well as the direction the policy and procedure seems to be moving. Information from the EAR Coordinators is given the same consideration and recognition as that of a Section Chief. Each member of the team is considered equal in importance and stature. In fact, field experience provided by the EAR Coordinator is considered a valuable resource in this process.

This contention supports denial of summary judgment as well.

Respondent also suggests that the typical allocation set forth in the Manager definition is the only possible allocation that can meet the specification. In its brief, respondent states:

[F]or the reallocation of positions upon implementation of the Survey 'typically' is absolute because no time has elapsed which would permit any variances from the allocation patterns found during the Survey. 'Typically' does become less than absolute as the time line moves beyond the effective date of the Survey.

In light of the absence of language elsewhere in the definition statement which explicitly excludes positions other than that of "environmental analysis and review section chief," the Commission will not, in the context of the instant motion, interpret the word "typically" as establishing the only possible

allocation at the Manager level. This conclusion is based in part upon the disclaimer language found at the beginning of the EAR Mgr. specifications stating that it "will not specifically identify every eventuality or combination of duties and responsibilities of positions that currently exist, or those that result from changing program emphasis in the future." In addition, the Inclusions statement refers to positions found in the "central, district, or field offices" of DNR. Finally, the definition statement in the EAR Mgr. specifications is not just a listing of allocations. The bulk of the definition language is of a more general nature, which is not specifically limited to the identified allocation. Where, as here, the appellant contends his position falls within the scope of that more general statement, summary judgment is inappropriate.

For these reasons, the respondent's motion for summary judgment must be denied as to the appellant Lovejoy. Respondent's motion relative to the Meier and Morrissey positions must be denied for identical reasons.


The Commission notes that the appellants will have to establish that they are assigned "management responsibility for all components of the environmental analysis and review program" comparable to that assigned to the section chief positions in order to prevail at hearing.

ORDER

Respondent's motions for summary judgment are denied. The parties will be contacted for the purpose of setting a new date for hearing.

Dated: May 2, 1994 STATE PERSONNEL COMMISSION

KMS:kms  
K:D:MSJ-reall (Lovejoy)

  
LAURIE R. MCCALLUM, Chairperson

  
DONALD R. MURPHY, Commissioner

  
JUDY M. ROGERS, Commissioner