

**GERARD M. SWIM,
KEITH A. WILKINSON,**
Appellants,

v.

**Secretary, DEPARTMENT OF EMPLOY-
MENT RELATIONS,**
Respondent.

DECISION AND ORDER

Case Nos. 92-0576-PC and 92-0613-PC

These cases involve appeals pursuant to §230.44(1)(b), Stats., of the reallocation of appellants' positions from Environmental Engineer - Senior (EE-Sr.) to Plumbing Plan Reviewer 2 (PPR-2). These cases were consolidated for hearing purposes.

The basic activities of appellants' positions are essentially accurately described in the position summaries on their position descriptions (PD's), as follows:

Swim

On an independent basis in the Madison office, and under the general direction of the Environmental Engineer Supervisor 4 of the Plan Review Unit in the Onsite Sewage Section of the Bureau of Building Water Systems: examine and evaluate large onsite sewage systems; examine onsite sewage system designs, plans and specifications for code conformance; review petitions for variances to code requirements; review plans for experimental systems; consult with owners, contractors, architects, engineers, government agencies and the public on onsite sewage systems; research and develop code changes and interpretations relating to onsite sewage systems; speak and make presentations at meetings in the counties served by the office; and utilize environmental engineering knowledge, theories and practices in the performance of the duties.

Wilkinson

On an independent basis, and under the general direction of Environment Engineer 5 Supervisor of the Plan/Plat Review Unit in the Onsite Section of the Office of Division Codes and Application: examine and evaluate large onsite sewage systems in the northeast regional office; examine onsite sewage system designs, plans and specifications for code confor-

mance; review petitions for variances to code requirements; consult with the owners, contractors, architects, engineers, government agencies and the public on onsite sewage systems; speak and make presentations at annual county meetings in the counties served by the regional office; and utilize environmental engineering knowledge, theories and practices in the performance of the duties.

The PPR position standard includes the following definition of PPR-2:

This is objective level plan and specification review and approval work for general plumbing or private sewage system to ensure compliance with Federal and State laws and regulations. Employees in this class independently review plumbing plans, sanitary sewer specifications, drain, waste and vent design and sizing for code compliance; consult with general public architects, plumbers, designers, engineers, inspectors, attorneys and legislators regarding plan review procedures and applicable statutes and codes. Work is performed under general direction of the Plumbing Supervisor.

There is no question but that the PPR-2 definition describes the work associated with appellants' positions. However, these positions could be classified appropriately as EE-Sr. If they satisfy the criteria set forth in that classification specification.

The Environmental Engineer class specification includes the following definition of EE-Sr.:

This is Senior level environmental engineering work involving difficult technical assignments which include consideration of complex variables and issues, unusual conditions, or unique circumstances not typically dealt with at lower levels. Positions at this level differ from lower level positions in that most objectives are broadly defined in relation to the position's total assignments. Examples of work performed include complex plan examinations, product examinations and inspections; reviews of precedence - setting petitions for variance and plans for experimental systems; and complex code interpretations and code - change draft preparation. Positions at this level independently deal with contractors, consultants, and other agency staff. Work is performed under general supervision.

The Environmental Engineer classification specification includes in the statement of “inclusions” the following: “This series encompasses professional engineering positions. These positions devote the majority of their time and are primarily responsible for providing engineering expertise in their assigned program area.” (Emphasis added).

Thus, the key issue before the Commission is whether a majority of appellants’ work (which is primarily related to plan review activities) involves engaging in the practice of professional engineering, as opposed to a lower level of engineering or technical activity. *See, Miller, et al. V. DER, 92-0122-PC, etc., 5/5/94.*

The most significant evidence of record that supports appellants’ case is the testimony of Ron Bucholz, the deputy division administrator during the period in question. In his opinion, the appellants, as well as the other plumbing plan reviewers in their section, are appropriately classified as environmental engineers on the basis of their engineering work. In the Commission’s opinion, this evidence is ultimately not persuasive.

Mr. Bucholz testified that appellants’ positions are virtually identical to those occupied by Pagel, Stiemke and Quinlan. Mr. Bucholz also testified in the *Miller, et al.*, cases on behalf of Mr. Pagel, et al. In those cases, the Commission determined that those positions had not been inappropriately classified in the PPR-2 classifications because the appellants had not established by a preponderance of the evidence that they were engaged in the practice of professional engineering a majority of the time. That determination is not conclusive per se on the appellants here (*Swim and Wilkinson*) – i.e., they are not foreclosed from trying to establish the contrary. This is because they were not involved in the *Miller* appeals. *See, e.g., Michelle T. v. Crozier, 173 Wis.2d 681, 495 N.W.2d 327 (1993).* However, the affirmance of respondent’s classification decisions as to these other positions in the section does take this case out of the ambit of the principle reflected in *Moran & Kaeske v. DER, 90-0372, 0382-PC, 1/11/94* (in a reallocation appeal, it is inappropriate for DER to rely on the classification of essentially identical positions whose incumbents did not appeal their reallocations, where the

rationale for all the reallocations are essentially the same). In this context, appellants Swim and Wilkinson have neither distinguished their positions from those of Pagel, etc., (they are essentially identical), nor provided other than conclusory opinion evidence that the Pagel, etc., positions are incorrectly classified as PPR-2's. Appellants have the burden of proof, *see Vranes v. DER*, 83-0122-PC, 7/19/84. Thus, DER does not have to demonstrate that it made the correct decision; rather, appellants must establish by a preponderance of the credible evidence that DER's decision was incorrect.

An attempt was made to compare the position occupied by Michael Beckwith to appellants' positions. Mr. Beckwith's 11/1/90 PD (Resp. Exh. 11) reflects an EE-Sr. classification and has an emphasis on plumbing products review. This was subsequently changed to EE-Adv. 1, and to Engineering Consultant-Plumbing Product Review-Advanced. Mr. Beckwith did not testify that his position is comparable to appellants', although he did identify some similarities.

Appellants argue that their duties and responsibilities are similar to Beckwith's, notwithstanding the positions are reviewing different things (plans for on-site sewage systems versus plumbing products). However, this argument is not supported by specific evidence in the record, but essentially constitutes their opinion. For example, Mr. Wilkinson's post-hearing brief points out that Mr. Beckwith has 55% plan review and 30% consultation, while his (Wilkinson's) PD has 60% plan review and 25% consultation. As the Commission observed in the *Miller* case (p. 12, proposed decision), general language of this nature can cover work spanning a broad range of complexity, and appellants did not establish that their work is as complex as Mr. Beckwith's.

Appellants also stress Mr. Beckwith's testimony that he relies primarily on mechanical and pneumatic engineering for his product plan reviews. It is asserted that this demonstrates respondent's lack of understanding of Mr. Beckwith's position. This contention does little to advance appellants' cases. First, it is not inherently inconsistent for a position in an environmental engineer classification to utilize principles of mechanical and pneumatic engineering. A number of the EE PD's in this record refer to the utilization of principles of pneumatics. Furthermore, appellants' point runs more

to the conclusion that Mr. Beckwith's position is classified in the wrong series (i.e., EE versus ME) than that his work is at the same level of complexity as appellants'.

Mr. Wilkinson also argues that he relied on a comparison to a building plan examiner position occupied by a Don Diederick in connection with a request for reallocation of his (Wilkinson's) position from EE-Journey to EE-Sr. He contends that since the requested reallocation eventually was granted, it follows that the positions are comparable. He further argues that Mr. Diederick's position is no more advanced than his.

It simply does not follow that because appellant compared his position to a building plan reviewer position, that the decision to reallocate his position demonstrates that the positions are comparable. It could have been the case that his request precipitated an analysis and subsequent reallocation that did not rely on that comparison. There is nothing in the record that addresses this point one way or another.

Furthermore, Mr. Diederick's position was reallocated into the Architect Series, apparently based on the conclusion that his building plan review activities more closely fit into that vocational area than it did environmental engineering, all of which lessens the significance of any comparison.

Mr. Wilkinson also raises an issue covering the purported absence of PD's for Architect positions. This apparently is based on a misunderstanding concerning Mr. Wilkinson's discovery request and/or DER's response thereto. Mr. Wilkinson requested "[a] copy of the 'Goals and Work Activities' for each level of the 'Architect' series" (letter dated May 3, 1996). DER responded (letter dated May 22, 1996) to this as follows:

"Goals and worker activities" is a phrase which is usually associated in connection with position descriptions. While at some point in time there might have been position descriptions for "each level of the Architect series," there are not position descriptions "for each level of the Architect series," whether it be for 1989 or 1991. Since the Architect series in effect in 1989 and 1991 were abolished there are no positions classified pursuant to those series, which in turn means that there are not position descriptions for the various old Architect levels.

In order to secure a position description for a level of the 1989 and 1991 Architect series, one first would have to obtain the name of an incumbent of a position classified as an Architect in 1989 and/or 1991 and determine if the employe is still employed by the State. One could then contact the employe and ask him/her to secure an old position description from the employe's P-file, if the position description still existed.

This does not mean that there were no PD's for the Architect positions during the period in question, but rather that the current PD's reflect the current classification series.

Mr. Wilkinson raises a number of other issues that run to the manner in which the classification specifications were written: 1) It is unfair that the PPR series only has two levels, and thus more limited room for advancement than the Architect and EE series; 2) DER has failed to follow statutory mandates regarding "job groups," §230.03(10r), Stats., and the establishment of classifications which "include all positions which are comparable with respect to authority, responsibility and nature of work required," §230.09(1), Stats.

These issues are outside the Commission's subject matter jurisdiction. Section 230.09(2)(am), Stats., provides that DER "shall establish, modify or abolish classifications as the needs of the service require." The Commission has no statutory authority to review the actions that DER takes under §230.09(1)(am), Stats. Rather, the Commission's material appellate jurisdiction, ¶230.44(1)(b), Stats., is limited to DER's actions under §230.09(2)(a), Stats., to allocate, reclassify or reallocate positions. The Commission has no authority to reject or modify classification specifications but must review reallocation decisions on the basis of the classification specification as written, *See, e.g., Zhe v. DHSS & DP*, 80-0285-PC, 11/18/81; affirmed, Dane Co. Circuit Court, *Zhe v. WPC*, 81CV6492 (11/82).

Mr. Wilkinson also contends that DER's approach to the classification of his position conflicts with §ER 2.04(3), Wis. Adm. Code: "The use of specific examples of work in a classification specification shall not be held to exclude the assignment of other work not mentioned, nor is it implied that all stated examples of work must be performed by all employes whose positions are so classified." He asserts that DER

reallocated his position into the PPR rather than the EE series for the improper reason that he was neither reviewing nor approving large onsite sewage systems.

The review of large on-site sewage systems is mentioned in the EE inclusions section, and a representative position in the EE classification Specification at the journey level. A key question with respect to the issue of the proper classification of appellant's position is whether he is involved in the practice of professional engineering (a prerequisite for the EE classification, see §I.B. "Inclusions," Resp. Exh. 2). DER made the determination as part of the engineering survey process that work involving "large on-site sewage systems" as exemplified by the representative position involves the practice of professional engineering, and included this position in the EE series as a representative position. The administrative code rule appellant cites does not apply to the use of representative positions, and it was not illegal for DER to rely on this representative position in addressing the proper classification of appellant's position. In any event, it should be clear that classification in this series is not limited to representative positions or their exact equivalents.¹

Mr. Wilkinson also asserts that his position in fact is comparable to the representative position because he does have responsibility for plan review for large systems. However, this is only 10% of appellant's PD, whereas Mr. Russell's PD² reflects 30% for this activity. Also, Mr. Russell's PD states that he has final decisional authority "for all large private sewage systems installed in the state," while appellant's PD does not reflect final approval authority.³

¹ The EE classification specification itself states at §I.A.: "This classification specification will not specifically identify every eventuality or combination of duties and responsibilities that currently exist . . . it is designed to serve as a framework for classification decision-making in this occupational area."

² Mr. Russell occupies or occupied this representative position.

³ Complainant also argues that the description of the representative position in the classification specification does not include the requirement of final review authority. While it certainly could be contended that such level of decisional authority is implicit, the distinction (i.e., one position having final review authority while the other one does not) is at the least a significant factor in comparing positions.

Mr. Swim's arguments are largely similar to Mr. Wilkinson's. Mr. Swim also stresses the length of time his position previously had been classified in the EE series, including a number of situations where that classification could have been questioned, such as when the position was reclassified as a result of progression through the levels in the series. While this prior classification has some probative value, it is limited in the context of the engineering survey, the development of new classification specifications, and the reallocation of many related positions.

Mr. Swim, like Mr. Wilkinson, stresses the lack of technical knowledge on the part of the personnel analysts involved in the reallocation of appellant's position. However, there was consultation with experts in the field as part of the overall process, albeit they were not all of the same opinion. In any event, the hearing before the Commission was de novo, not merely a review of respondent's original approach to this transaction. In other words, regardless of the degree of soundness of the original process followed by DER, the Commission bases its decision on the evidence adduced at the hearing, *see, e.g., Ratchman v. UW-Oshkosh & DER*, 86-0219-PC (11/18/87).


Mr. Swim also contends that "the percent of time an individual performs a certain duty should not govern the classification of the individual. The determining factor should be if the individual can perform the specified engineering duties at all. We can not turn our time percentages on and off like a switch." However, the EE classification specification specifically provides that positions must devote the majority of their time and are primarily responsible for providing engineering expertise in their assigned program area," (Resp. Exh. 2, §I.B.), which also is consistent with general classification principles, *see, e.g., Tiser v. DNR & DER*, 83-0217-PC, 10/10/84.

ORDER

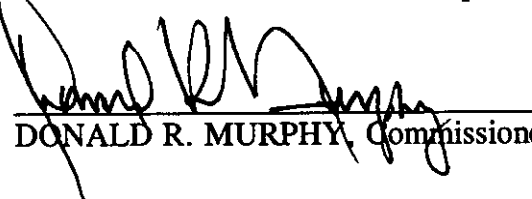
Respondent's reallocations of appellants' positions to PPR-2 are affirmed and these appeals are dismissed.⁴

Dated: January 16, 1997

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

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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

⁴ The commission has adopted the proposed decision and order of the hearing examiner with minor changes of a typographical and editorial nature.

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