

STATE OF WISCONSIN

PERSONNEL COMMISSION

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GERALD G. HOLTON, JR.,

Appellant,

v.

Secretary, DEPARTMENT OF
EMPLOYMENT RELATIONS, and
Secretary, DEPARTMENT OF
INDUSTRY, LABOR AND HUMAN
RELATIONS,

Respondents.

Case No. 92-0717-PC

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INTERIM
DECISION
AND
ORDER

This is an appeal pursuant to §230.44(1)(b), Stats., of the allocation of appellant's position to Engineering Technician 5 (ET 5) rather than Engineering Specialist - Senior (ES-Sr.).

Appellant's position is in the Department of Industry, Labor and Human Relations, Division of Safety & Buildings, Bureau of Petroleum Inspection and Fire Protection, Fire Protection and Underground Storage Tank Section. The PD (position description) (Respondent's Exhibit 3) for this position is essentially accurate as far as it goes. It contains the following "position summary":

Perform the review of underground and aboveground tank construction plans for conformance to the requirements of the Flammable and Combustible Liquids Code and the Federal EPA rules. Investigate and resolve issues of tank construction, conformance to Administrative Code or Federal EPA rules raised by local fire departments, engineering firms, owners, or other impacted parties. Act as a contact point within the Division to answer technical questions and provide information regarding UST/AST rules and requirements.

Assist in developing and implementing plan submittal guides that outline the construction and installation methodology of storage tank installations. Participate in code related training for Bureau staff and certified inspectors. Act as a technical resource for the field staff responsible for the administration and operation of a storage tank program approved by the federal EPA. Translate Federal and State Rules into technical applications.

Appellant's position is under the general supervision of Section Chief Sheldon Schall, an Administrative Officer 1 - Supervisor. Mr. Schall reports to the Bureau Director, William J. Morrissey, an Administrative Officer 2. Neither of these supervisors are engineers or have engineering training. Appellant receives no real oversight of the technical aspects of his work, and is relied on as the expert with respect to the storage tank program. He acts as the agency's spokesperson or representative for this program in dealing with the private sector and other entities, and is effectively responsible for this program.

In performing his plan review and related activities, appellant must utilize principles of mathematics, chemistry and physics in order to determine whether plans will be adequate with respect to such things as vapor recovery and corrosion control. These activities go beyond checking compliance with straightforward code criteria. The plan submissions have become more detailed and the review process more complicated since appellant began LTE employment in this position in 1991.

Appellant originally occupied this position on an LTE appointment, at which time it was classified at the ET 4 level. Subsequently, appellant was appointed to the position on a permanent appointment basis at the ET 4 level and requested a change to ES-Sr. Respondent reviewed the position and approved a change in classification to ET 5, but decided that ES-Sr. was inappropriate (see Respondent's Exhibit 4).

The juxtaposition of some of the key language in the class specifications is helpful with respect to understanding some of the distinguishing features of the two classifications:

I. A. Purpose of this Class Specification

Engineering Technician

Positions allocated to this series perform technical engineering work which provides direct technical assistance to professional architect or engineer employes, activities and programs.

Engineering Specialist

Positions allocated to this series are primarily responsible for providing specialized professional engineering expertise.

B. Inclusions

Engineering Technician

These positions perform technical work in the field of architecture/engineering in the planning, design, construction, maintenance and review of facilities. These duties can include but are not limited to plating, plan entry, or assisting professional architect or engineer employes, activities and programs in a variety of technical aspects.

Engineering Specialist

These positions devote the majority of their time and are primarily responsible for providing engineering specialist duties in their assigned program area. These positions have responsibilities for specific aspects of a larger architecture/engineering management program.

C. Exclusions

Engineering Technician

* * *

1. Positions that perform professional work in the field of architecture/engineering and meet the current definition of professional in §111.81, Wis. Stats., and the Fair Labor Standards Act.

* * *

4. All other positions which are more appropriately identified by other class specifications.

* * *

Engineering Specialist

* * *

1. Positions that require a degreed engineer, and are more appropriately classified within a professional engineering series.

* * *

4. All other positions which are more appropriately identified by other series.

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II. Definition

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Engineering Technician 5

This is advanced work within a technical engineering function. The skills, knowledges and abilities required are for a complex specialized technical function. The employe may be responsible for a narrow complex portion of a project. Work is performed under general supervision.

* * *

Engineering Specialist-Senior

This is senior level engineering specialist work. Employees at this level differ from lower level positions in that the engineering specialist has responsibilities for a specific program. The incumbent develops and follows broadly defined work objectives and the review of the work is limited to administrative evaluation by the supervisor. Positions at this level have extensive authority within their assigned program area. The engineering specialist is considered the expert in the assigned area. Work is performed under direction.

REPRESENTATIVE POSITIONS:

Engineering Technician 5

No current allocation.

Engineering Specialist-Senior

Department of Natural Resources

Natural Resources Engineering Technician - Perform technical engineering services for natural resource related facilities which include waterfowl impoundments, rearing ponds, secondary roadways, trails, public access facilities, channel improvements and water control structures. Inspect existing state-owned facilities and notify managers of existing or potential health and safety code violations and potential maintenance problems.

University of Wisconsin

Engineering Specialist - Responsible for the design, fabrication, and assembly of highly complex mechanical components of scientific instruments and machinery which support research and/or instruction programs in departments or centers. Provide expert consultation to engineers, scientists and students regarding design and fabrication issues and problems, may oversee machining and fabrication operations. The hardware that is built is frequently prototypical (one-of-a-kind) and may require the development of unique, innovation methods or

machining and fabrication. These positions function at a level of technical expertise and skill above that normally identified in Instrument Maker positions.

Both series incorporate the performance of engineering work. The ET series involves "technical engineering work which provides direct technical assistance to professional architect or engineering, employes, activities and programs." (emphasis added). The ES series involves the provision of "specialized professional engineering expertise," [and] have responsibilities for specific aspects of a larger architecture/engineering management program." (emphasis added) The difference between "technical" and "specialized professional" engineering work or expertise is not specifically defined by the relevant class specifications, but this distinction is critical to the determination of whether appellant's position is more appropriately classified in the ET or the ES series. Respondent's case relies in large part on an interpretation of these specifications with which the Commission cannot agree.

Respondent contends that classification in the ES series requires that a position perform professional engineering work as defined by the Commission in Miller v. DER, 92-0122-PC, etc., (5/5/94), which dealt with the issue of whether appellants' positions should be classified as professional engineers. For example, in its posthearing reply brief, respondent contends:

The Engineering Specialist series has similar language to that found in the Environmental Engineering series cited in Miller, to wit: "professional engineering." Whether that phrase describes an engineer "specialist" or an environmental engineer is of no significance. The point is the same language is used and it therefore must have the same meaning. The meaning is as found in Miller.

The Environmental Engineer class specification quoted in Miller includes this language: "[t]his 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." Miller proposed decision, pp. 5-6. In contrast, the ES class specification refers to positions "primarily responsible for providing specialized professional engineering expertise." (emphasis added). The main reason the Commission disagrees with respondent's interpretation of these class specifications is that it effectively eliminates the modifier "specialized" from

the ES classification, and requires the same kind of professional engineering work at the ES level as is required for a full-fledged engineering classification such as Environmental Engineer. It seems relatively clear that the Engineering Technician, Engineering Specialist, and Environmental Engineer series represent a continuum with respect to the level of engineering work involved at the various levels, from technical to specialized professional to professional. The word "specialize" means: "to limit in scope or interest: focus on a special area of knowledge or activity." WEBSTERS'S THIRD NEW INTERNATIONAL DICTIONARY 2286 (1981). In the context of the three levels of engineering represented by these series, the engineering specialist is not a *specialist in the generalist vs. specialist sense (e.g., general practitioner or family physician vs. radiologist)*, but rather in the sense of having a narrower degree of professional duties and responsibilities and requisite qualifications. To require the Engineering Specialist to have the same level of engineering expertise and work as the professional engineer obliterates a key distinction between the two classifications.

Respondent appears to contend that the first exclusion in the ES class specification supports its interpretation. This excludes "[p]ositions that require a degreed engineer, and are more appropriately classified within a professional engineering series." Respondent presents the following argument in its reply brief:

The first Exclusion uses the phrase "professional engineering." However, that phrase is in conjunction with positions that also "require a degreed engineer." Positions which meet both requirements are excluded. There is nothing inconsistent with the use of "professional engineering" in the Exclusion part and in the Introduction I A and B parts. The meaning is the same in both instances. Thus Respondent's contention is not inconsistent when it argues that Appellant's position must meet the "professional engineering" requirement. In this case, Appellant must meet the "professional engineering" standard, but he does not have to meet the "degreed engineer" requirement. Since his position does not meet the "professional engineering" requirement found in the Inclusion language, his position cannot be classified as an Engineering Specialist.

Again, the Commission cannot agree with this approach. If a position is *primarily involved in professional engineering activities, but does not* require a degreed engineer, while it presumably would not fall within the first ES exclusion ("[p]ositions that require a degreed engineer, and more

appropriately classified within a professional engineering series"), it presumably would fall within the fourth ES exclusion ([a]ll other positions which are more appropriately identified by other series").

In the Commission's opinion, the only approach to interpretation of the ES class specification which will maintain the distinction between this series and the related engineer series is to consider "specialized professional engineering expertise" (§ I. A., Respondent's Exhibit 2) and "engineering specialist duties" (§ I. B., Respondent's Exhibit 2), as referring to a professional level, but at a more restricted degree of engineering expertise and responsibility than professional engineering per se.

Respondent also bases its case on the contention that appellant does not satisfy the definition of "professional employe" found at §111.81(15)(a), Stats., which provides:

(15) "Professional employe" means:

(a) Any employe in the classified service who is engaged in work:

1. Predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical or physical work;

2. Involving the consistent exercise of discretion and judgment in its performance;

3. Of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time;

4. Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual or physical processes.

The testimony on this factor adduced by respondent reflects reliance on subparagraph 111.81(15)(a) 4.: "Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning...." The Commission cannot agree that the usage of the word

"professional" in the ES class specification justifies the wholesale incorporation of the definition of "professional employe" provided by §111.81(15)(a) 4., Stats., as this requires for classification at the ES level the same knowledge base as is required for a professional engineer classification per se. Again, this approach would obliterate the distinction between the two classifications.

There is nothing in the ES class specification which specifically incorporates or cross-references the criterion for "professional employe" found at §111.81(15)(a) 4., Stats. The ET class specification includes in the statement of "exclusions" the following:

Positions that perform professional work in the field of architecture/ engineering and meet the current definition of professional in s. 111.81, Wis. Stats., and the Fair Labor Standards Act. ¶ I. C. 1., Respondent's Exhibit 1.

However, it does not follow from this provision that these criteria are necessary for inclusion in the ES series. If these criteria had been intended as necessary for inclusion in the ES series, they presumably would have been explicitly stated therein.

The use of the word "professional" in the ES class specification, at ¶ I. A. is not in the context of providing professional engineering expertise, but rather "providing specialized professional engineering expertise" (emphasis added). Since the term "professional" is modified by the term "specialized," this modifier must be given effect, which is not accomplished by utilizing the knowledge base set forth at §111.81(15)(a) 4., Stats., for a full-fledged professional engineering position. Therefore, the Commission cannot agree that it is appropriate to use this criterion (§111.81(15)(a) 4.) of professional without modifying it consistent with the language in the ES class specification. An employe with "specialized professional engineering expertise" as set forth in the ES class specification would not need to have the level of expertise that would be characterized by an engineering degree, or equivalent training and experience. However, such an employe would be utilizing a degree of expertise associated with the performance of engineering activities of a more advanced nature than the technical engineering activities associated with the ET classification. While appellant has not established that his work by and large requires advanced knowledge of a nature associated with an

engineering degree, he is using principles of mathematics, chemistry, and physics that appear to be more advanced than that associated with the ET work that appears on this record.

For example, the ET 4 position description for Richard White's position (Respondent's Exhibit 5) performs plat reviews. One of respondent's expert witnesses cited this position as comparable to appellant's in part because they are both conducting reviews for compliance with rules and statutes. However, the record reflects that appellant's work goes considerably beyond this because in addition he has to perform engineering calculations to determine if submitted plans will achieve their intended goals.

Respondent contends that appellant's case is weakened by testimony provided by one of his witnesses on cross examination that his work is similar to that performed by the plumbing plan reviewers in his division, whose positions were involved in the Miller case. This argument relies on respondent's contention, discussed and rejected above, that classification as an Engineering Specialist requires meeting the criteria for professional engineering per se. In the Commission's opinion, this comparison supports appellant's case, because on the basis of the Miller decision, the type of work performed by those employees is not inconsistent with the ES level of engineering work.

While ET 5 positions could be expected to have considerable probative value, there are no ET 5 position descriptions in this record,¹ and the ET 5 class specification has no representative positions at this level.

Appellant entered two ES-Advanced 1 PD's in the record -- Appellant's 6 and 7. These positions have responsibilities for the Rental Weatherization Program, and plan review and inspection with respect to manufactured housing, respectively. Comparison of these positions with appellant's supports his appeal. However, respondent produced evidence that these positions are misclassified. The Commission agrees that, at least based on their PD's, these positions appear to be misclassified as ES-Advanced 1, because of the absence or at least paucity, of specialized professional engineering activities and associated expertise. While one of these positions (Appellant's Exhibit 6) is identified in the ES class specification as a representative position at the ES-

¹ There is an ET 5 - Transportation PD (Appellant's Exhibit 21), but since the class specification for this series is not of record, no real weight can be attached to this document.

Advanced 1 level, one of respondent's expert witnesses testified that the class specification was largely drafted by the employing agencies, and this identification was in error. The Commission agrees that notwithstanding its identification as a representative position, Appellant's Exhibit 6 appears on the basis of this record to be so incorrectly classified that it still cannot be used as a basis for comparison. This position is described in the ES-Adv. 1 class specification as follows:

Determines compliance of residential rental properties with the energy conservation code and statutory requirements established under the State's Rental Weatherization Program. Performs property inspections, responds to inquiries regarding code compliance issues, conducts special program presentations, monitors program conformance, and provides administrative support.

Due to the apparent absence of any advanced type of engineering work in this position, its use as a comparison would appear to be completely at odds with the ES classification concepts. Identification of a position as a representative position in a class specification is not binding if it does not fit within the definitional language of the class specification. See Eagon v. DER, 90-0398-PC (3/23/92).

Respondent entered four ES-Sr. PD's into the hearing record -- Respondent's Exhibits 6-9. Respondent's Exhibit 6 is a PD for a position involved in the design, development and construction of complex engineering equipment and testing procedures in the soil mechanics area. It is somewhat difficult on this record to determine the extent to which this position is involved with specialized professional engineering vs. complex technical activities and expertise.

The next two positions are more clearly identified as involved in specialized professional engineering. Respondent's Exhibit 7, for example, is responsible for preparing and checking complex engineering plans, etc. This position requires "[e]xtensive knowledge of the principles and practices of soil and water conservation engineering." Respondent's Exhibit 8 describes a position which "assists in the design and construction supervision of Natural Resources related projects," and requires "[g]raduation from college, vocational or trade school in civil engineering, with engineering technology or a closely related field."

Respondent's Exhibit 9 involves a position which conducts "inspection surveys of dams under direction of state dam safety engineer" (35%), and another 25% conducting water level surveys and other water-related surveys, and assisting in dam inspections. Like Respondent's Exhibit 6, it is difficult on the basis of this record to compare it to appellant's position with respect to its degree of involvement with specialized professional engineering activities and expertise.

The positions represented by Respondent's Exhibits 7 and 8 appear to have a broader scope of involvement with specialized professional engineering activities and expertise than appellant's position. However, these comparisons do not mean that appellant's position would be improperly classified at this level. For one thing, it is not uncommon to have positions within a range of classification strength at the same level, so long as they all fit better at that level than in other alternative classifications. Another reason is that both Respondent's Exhibits 7 and 8 function under the direct supervision of an engineer. Appellant's position is not supervised by an engineer and receives very little supervision from an engineering standpoint. Appellant functions as the primary expert in the storage tank area, and effectively is responsible for the underground and aboveground storage tank program for DILHR.

The record establishes not only that appellant's position is more appropriately classified in the ES series rather than the ET series, it also establishes that it is more appropriately classified at the ES-Sr. level than at a lower level.

The ES-journey definition states that "[w]ork is reviewed to determine soundness of engineering judgment." Appellant's work does not receive this kind of review. Rather, appellant's position fits squarely within the ES-Sr. definition:

This is senior level engineering specialist work. Employees at this level differ from lower level positions in that the engineering specialist has responsibilities for a specific program. The incumbent develops and follows broadly defined work objectives and the review of the work is limited to administrative evaluation by the supervisor. Positions at this level have extensive authority within their assigned program area. The engineering specialist is considered the expert in the assigned area. Work is performed under direction.

As discussed above, appellant is the agency spokesperson and expert for the tank storage program and in effect administers the program.

This point also relates to an argument on which respondent has relied, and with which the Commission disagrees. Respondent has noted that there are no higher level engineering positions within appellant's section, and contends that this indicates that appellant's position cannot fit within the ES class specification inclusions provision (Respondent's Exhibit 2, ¶ I. B.) that "[t]hese positions have responsibilities for a larger architecture/engineering management program." However, this language must be squared with the above-quoted language from the ES-Sr. definition that positions at that level have responsibilities for a "specific program." There is no reason why appellant's program cannot be considered as part of a larger program in the safety and buildings area.

Respondent also contends that the majority of appellant's work does not involve plan review, pointing out that his PD (Respondent's Exhibit 3) has a 75% goal A for plan review, but that this goal is broken down into eight activities which are not assigned separate percentages. Activity A1 involves plan review per se while the others are related to the plan review function. Respondent goes on to contend that since DER's prevailing practice is to assume the activities are equally weighted if the PD does not assign them specific percentages, that therefore appellant must have a small percentage of actual plan review. However, the record does not establish that appellant's PD was prepared using this convention, and in any event, most of these Goal A activities are related to the plan review process.

With respect to respondent's contention that appellant's position is not exempt under FLSA, the Commission agrees with appellant that this is essentially a circular argument. The ES class specification specifically provides that positions classified at the ES-Journey level or higher are exempt.

In conclusion, this position is utilizing some advanced engineering expertise and is effectively responsible for the administration of the storage tank program. This is more consistent with the language in the ES class specification than the ET class specification with its emphasis on providing technical assistance. Also particularly significant to the decision of this case is the fact that respondent's decision has been based on what the Commission perceives on this record as incorrect premises -- that appellant's work involves relatively straightforward code compliance plan review and that ES

classification requires that appellant's work meets the definition of professional engineering.

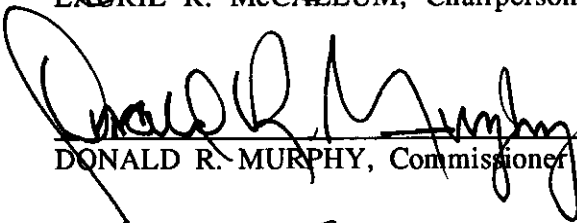
ORDER


Respondent's action reclassifying appellant's position to ET 5 rather than ES-Sr. is rejected and this matter is remanded to respondent for action in accordance with this decision.

Dated: January 20, 1995 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

AJT:rcr


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

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