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STATE OF WISCONSIN

CIRCUIT COURT  
Branch 13

DANE COUNTY

DAN MURRAY.

Plaintiff.

- vs -

Case No. 93CV2661

WISCONSIN PERSONNEL COMMISSION.

Defendant.

RECEIVED

MAY-1-0 1994

HONORABLE MICHAEL NOWAKOWSKI, PERSONNEL COMMISSION  
Presiding.

APPEARANCES:

For the Plaintiff, GARD STROTHER,  
Attorney at law, 222 S. Bedford  
Street, Madison, Wisconsin.

Defendant represented by STEPHEN  
SOBOTA, Assistant Attorney General,  
123 W. Washington Avenue, Madison,  
Wisconsin.

DATE: April 29, 1994.

PROCEEDINGS: Oral Decision.

COPY

1                   THE COURT: Well much time has been devoted  
2                   in the briefing and today in argument to the issue of  
3                   standard of review on judicial review of an  
4                   administrative agency decision case. That is as it  
5                   should be because the appellate decisions in this state,  
6                   and I would surmise probably in all other states as well  
7                   as at the federal level, have described the standard of  
8                   review in terms which reflect the fact that the  
9                   legislature has seen fit, both at the federal level and  
10                  at the state level, to delegate to administrative  
11                  agencies important adjudicatory functions to be performed  
12                  because of the expertise that those agencies have and  
13                  their ability therefore to make more reasoned and proper  
14                  decisions in a more consistent fashion than would be true  
15                  if those competing cases were to go into courts each time  
16                  that they became the subject of dispute. And so out of  
17                  those principles have evolved the substantial evidence  
18                  test and have evolved the deference and the varying  
19                  levels of deference that are owed to determinations  
20                  reached by administrative agencies on questions of law.

21                  There is no question, and I need not today recite  
22                  all of the ingredients of the substantial evidence test  
23                  as there has been no dispute between the parties as to  
24                  what comprises the statement of that standard of review,  
25                  that it is clearly applicable to pure questions of fact.

1 as found by an administrative agency. Here Finding of  
2 Fact. Number 17 which is the focus of the dispute, while  
3 denominated by the agency as a Finding of Fact, is really  
4 a mixed question of law and fact in that it is a finding  
5 which requires the application of a legal standard to  
6 historical facts as they are found by the agency. And  
7 thus it is my view that the review of this is subject to  
8 the standard for review of questions of law because the  
9 application of a legal standard to facts is often cited  
10 in the cases as a question of law.

11 Now the precise question presented is one that  
12 falls at the very heart of the responsibility given to  
13 the Personnel Commission by state law. There is no  
14 question and the petitioner here does not dispute that  
15 the Personnel Commission has enormous expertise in having  
16 to make the kind of judgments which it was called upon to  
17 make in this case. Given the historical experience that  
18 it has in making these judgments and given the delegation  
19 to it of the responsibility to do so by the Legislature,  
20 this is an instance where its determination and its  
21 ultimate conclusion are subject to limited court review  
22 and this Court must grant great deference to its  
23 determination and only in the event that its  
24 determination is one which is unreasonable and especially  
25 were it to be found to be a conclusion based upon

1 erroneous conclusions of law should this Court intervene.  
2 But it's important to emphasize that even in the instance  
3 where great deference is owed to an administrative  
4 agency, the opportunity for judicial review which is  
5 guaranteed by state law makes it implicit that courts  
6 have a role to play which is not simply one of rubber  
7 stamping decisions made by administrative agencies. But  
8 the role to play is to be played within fairly narrow  
9 confines which I think I've now identified.

10 Now I think there are several preliminary points  
11 with regard to this specific case that ought to be  
12 identified at the outset.

13 First, as confirmed earlier on today's oral  
14 argument, the parties to this dispute, the Department of  
15 Employment Relations and the petitioner himself, agreed  
16 before the Commission to limit the choices available to  
17 the Commission by confining the Commission's focus to a  
18 choice between two positions rather than a more general  
19 or comprehensive analysis of which job classification  
20 within the entire civil service system of Wisconsin was  
21 the best fit for the actual responsibilities of Mr.  
22 Murray's job or whether perhaps two or three or four  
23 other possibilities were ones that would be the best fit.

24 Here it was by stipulation of the parties an all or  
25 nothing proposition. It was either going to be the one

1 or the other and the Commission accepted that limitation  
2 because of the agreement that the parties had made.

3 Second, Mr. Murray had the burden of proof before  
4 the Commission to show that the Department of Employment  
5 Relations classification was not the best fit by  
6 presenting evidence which would constitute a  
7 preponderance of the evidence in the view of the  
8 fact-finder, in this case the Personnel Commission.

9 Third, neither party disputes that the governing  
10 legal standard for determining the best fit for Mr.  
11 Murray's job were the provisions found in the  
12 respondent's exhibits, Numbers 1 and 2 that were received  
13 after being introduced at the Commission level, namely  
14 the classification specifications developed by DER as an  
15 outgrowth of the Administrative Rules that DER itself  
16 created and which were ultimately made a part of the  
17 Wisconsin Code of Administrative Rules.

18 Fourth, on this review neither party questions the  
19 Commission's conclusion that Mr. Murray's job falls  
20 within the general definition of the classification  
21 specifications for an AE Manager-1 in that he is a  
22 section chief in a major complex agency, architecture  
23 engineering services program. Now contrary to Mr.  
24 Murray's contention, however, this does not end the  
25 inquiry. The definition section at issue says "Positions

1 can function as", and then goes on to describe the  
2 various possibilities. It does not say that any employee  
3 who holds one of these designated positions must be  
4 classified AE Manager-1. This is also obvious from the  
5 fact that certain of the designated positions for AE  
6 Manager-1 are also listed in the definition for AE  
7 Manager-2. The unambiguous meaning of the classification  
8 specifications definition is that they create something  
9 of a presumption that if a person has a position within  
10 the definition, they are properly classified at that  
11 level. This is clear from the language in Section T-F  
12 which in referring to these definitions uses the preface  
13 "In most instances..." Thus here Mr. Murray is properly  
14 classified as an AE Manager-1 unless one of the  
15 exclusions shows that this is not the best fit for his  
16 actual job.

17 Here the Commission relied upon the first exclusion  
18 and found Mr. Murray's job does not perform predominantly  
19 executive and managerial functions as defined in Section  
20 111.81 of the statutes. In doing so, the Commission made  
21 a clear error of law in reaching the conclusion it did at  
22 page 19 of its decision and I quote from that decision,  
23 "The statutory definition of management indicates that it  
24 is the bureau level rather than the section level which  
25 has been selected as serving as the basis for defining

1 where management responsibilities begin."

2 It must be remembered that Section 111.81 does not  
3 by legislative directive govern the determination made  
4 here. Section 111.81 was referenced in an administrative  
5 rule as a tool, as a help to the administrative agency,  
6 but it is a statute governing or relating to a different  
7 body of law all together. It incorporated this -- the  
8 Legislature did not itself say that this was the  
9 governing principle that would apply to determining  
10 classification allocations in civil service. The DER  
11 classification specifications themselves in reference to  
12 this specific issue defined the level at which the  
13 management responsibilities begin, and they specifically  
14 recite that a section chief is where management begins.  
15 To read the reference to the statute in the exclusion  
16 section as the Commission has would write out the  
17 definition section as providing the standard and this is  
18 improper: especially is this so where the statute uses  
19 the broadly inclusive language "including such officials  
20 as", and then goes on to describe several examples  
21 rather than restrictive limiting language.

22 The issue remains, however, as to whether or not  
23 the findings made by the Commission are sufficient to  
24 show that the petitioner, Mr. Murray, failed to meet his  
25 burden of showing that his job and his responsibilities

1 did not fall within the exclusion that DER had relied  
2 upon.

3           Several points need to be made in that regard.  
4 First, Mr. Murray argues that the Commission improperly  
5 relied upon the criteria testified to by Mr. Pankratz and  
6 as I read the decision. I do not believe that it was  
7 improper for the Commission to have received this  
8 testimony or for the Commission to have looked to these  
9 factors as evidentiary matters to assist the Commission  
10 in determining what this undefined phrase "predominantly  
11 managerial or executive" meant. I think in passing, it  
12 would be of great assistance in avoiding controversies of  
13 this sort in the future and in providing guidance both to  
14 those who are making these allocation decisions in the  
15 first place as well as to employees whose jobs are being  
16 allocated to have these terms in the exclusion which are  
17 used in the inclusion as well of "managerial and  
18 executive" defined with more precision so that they are  
19 not so vague as to leave the Commission to have to apply  
20 or even to entertain testimony about what they mean on a  
21 case-by-case basis. But it does not appear here in  
22 considering Mr. Pankratz' testimony that the Commission  
23 elevated his criteria to governing principles and thereby  
24 ignored its responsibility to determine this case on the  
25 basis of what were the governing principles, namely the



1 question of which was the best fit under the  
2 classification specifications that had been developed by  
3 DER.

4 However, I cannot, as I read through this decision,  
5 find a justification for the conclusion which was  
6 ultimately reached in light of the findings, the factual  
7 findings which the Commission made, and I do conclude  
8 that the Commission's decision in this case was therefore  
9 unreasonable and was contrary to the legal standard that  
10 it was required to apply and the decision must be  
11 reversed.

12 One reason is that which I have cited already and  
13 that is that the Commission at least in part relied upon  
14 an erroneous view of the law about where does management  
15 responsibility begin and its conclusion about that being  
16 at the bureau level when the clear governing legal  
17 principle is that it begins at a level that includes Mr.  
18 Murray's position.

19 Secondly, the Commission found that two individuals  
20 occupied positions within the same division or bureau as  
21 Mr. Murray does and perform very, very similar functions  
22 to that performed by Mr. Murray and both of those people  
23 are section chiefs and both of them are classified at the  
24 CE supervisor-5 level.

25 The Commission further found that the only

1 significant differentiating feature of their job as  
2 compared to Mr. Murray's was one which had to do with his  
3 budget preparation responsibilities which they did not  
4 have and which the Commission acknowledged was a  
5 responsibility that fell within the management type of  
6 function. Yet the Commission, in spite of that,  
7 determined that a CR supervisor-4 allocation for Mr.  
8 Murray's position, one which was less responsible, one  
9 which indicated a lower place in the hierarchy of  
10 responsibilities, was appropriate. The Commission was  
11 constrained by the parties' "all or nothing" agreement T  
12 referred to earlier, but it provides no explanation for  
13 how it could conclude that the best fit for Mr. Murray  
14 was at a level below these two individuals when it was  
15 undisputed that he had greater management  
16 responsibilities than they did.

17 While the Schlough position did not have that  
18 quality of supervisor, these positions ignored by the  
19 Commission show that this is not the per se disqualifying  
20 factor that the Commission made it.

21 Finally, to the extent the Commission relied upon  
22 its finding that there was no precise tabulation of the  
23 time spent by Murray on each activity and the explanation  
24 for this in the footnote on page 17, this stands in the  
25 face of the unrebutted testimony of Murray and his

1 supervisors. This is an instance where no reasonable  
2 person could have made the finding the Commission did  
3 from the evidence before it.

4 If this were the case where the option existed for  
5 the Commission to have reallocated Mr. Murray to a CE  
6 supervisor-5 level, and had the Commission made that  
7 choice, then I believe that the choice would have been  
8 sustainable and this Court would not have been able to  
9 reach the conclusion that it did. But given the  
10 limitations imposed upon the Commission, given the all or  
11 nothing approach taken by both parties to this case, to  
12 have Mr. Murray's position located below the CE  
13 supervisor-5 level cannot be sustained on the basis of  
14 the findings that were made by the Commission; and for  
15 the Commission to have done so in the face of its own  
16 findings is unreasonable. The only other choice which  
17 was available to the Commission, namely the AE manager-1  
18 allocation, was the only reasonable choice that could and  
19 should have been made by the Commission on the basis of  
20 its own findings and with all deference to it.

21 In addition, it is clear that the Department of  
22 Employment Relations assigns great weight, and therefore  
23 the Commission needs to assign great weight, because this  
24 is reflected within these classifications specifications,  
25 to the notion of representative positions or comparable