Tony Theobare

STATE OF WISCONSIN CIRCUIT COURT
BRANCH 14

NILE A. OSTENSO

Petitioner,

V.

WISCONSIN PERSONNEL COMMISSION,

Respondent.

Case No. 94 CV 1571

DECISION AND ORDER

BACKGROUND

Nile Ostenso (Petitioner) has petitioned the court to review the Wisconsin Personnel Commission's (Respondent) decision which dismissed his appeal to be reallocated from a Water Resources Engineer-Advanced 1 classification to a level 2 classification pursuant to §227.57 Wis. Stats. Petitioner states that he seeks review as the decision is not supported by substantial evidence and because Respondent deviated from prior agency practice by not giving testimony far more weight than document evidence. After review of the record I conclude that Petitioner's claim that the agency deviated from prior agency practice is without merit and that substantial evidence does support Respondent's decision. Therefore, I affirm Respondent's decision.

FACTS

In 1988 and 1989, the Department of Employment Relations (DER) conducted a survey for all engineers employed by the State of Wisconsin. DER worked with state agencies which employed engineers to identify positions in the agencies which were representative of the types of work engineers did in each agency. Seventy-seven

representative positions (Benchmark Positions) from 12 agencies were identified for assessment by a panel of 13 experts (the Master Rating Panel) chosen for their knowledge of the engineering work done in various state agencies, including two panel members from the Department of Natural Resources (DNR).

The 77 incumbents of the Benchmark Positions each completed a Wisconsin Quantitative Evaluation System (WQES) questionnaire. The questionnaire asked each incumbent in the Benchmark Position to provide information specific to the Benchmark Position on the following nine factors: knowledge, complexity, discretion, consequence of error, effect of actions, physical effort, personal contacts, hazards and surroundings. Each panel member also had a copy of all 77 positions descriptions (PDs), as well as a description of the related agency programs. All information provided was to be accurate as of June 17, 1990.

Based on this information, each panel member scored the complexity factor for all 77 positions. DER staff scored individuals for the hazards and surrounding factors. The panel members were split into two groups with each group scoring half of the remaining factors for each benchmark position.

DER arrived at a total score for each of the 77 Benchmark Positions by taking the panel's score for each factor and multiplying it by a set figure to give "weight" or emphasis to the factors. DER listed the resulting scores numerically along a continuum. Some positions clustered near or at similar scores, whereas other positions fell between clusters. DER assigned the between-cluster positions to the cluster immediately above or below it, depending on which cluster was most like the between-cluster position.

The classification levels were created for each cluster of Benchmark Positions. Pay range assignments were determined through bargaining with the union which represented engineers in classified civil service. DER finalized class specifications based upon the Master Rating Panel results and the bargaining process. After bargaining, all non-benchmark engineering positions were evaluated by comparison to the Benchmark Positions using one of three methods authorized by DER. DNR chose the method referred to as "whole-job analysis."

Petitioner worked at DNR. His position was not a Benchmark Position rated by the Master Rating Panel. Rather, his position was evaluated by a DNR panel using the "whole-job" analysis. DNR sent the final results to DER and DER assigned classifications to the results. DER classified Petitioner's position as a Natural Resource Engineer-Senior.

Suzanne Steinmetz, a specialist from DNR's personnel office worked with DER on the DNR positions to determine whether the results which placed no DNR positions above the senior level were correct. After this review, approximately 23 of DNR's 90 engineering positions were placed at the Advanced 1 level. Petitioner's position went to the Advanced 1 level.

DER convened a second panel (Second Panel) in February 1991, to consider the informal appeals. Petitioner's position was not included for review by the Second Panel. The second panel did not compare positions to the class specifications. Rather, the Second Panel reviewed positions to arrive at a numerical score as did the Master Rating Panel, except Second Panel members evaluated all factors (except hazards and surroundings) for all positions and such evaluation took into account the information considered by the Master

Panel (where the position was a Benchmark Position), as well as information submitted by the engineers for their informal appeals. About 30 of the 40 reviewed positions went to the Advanced 2 level as a result of the Second Panel process.

These 40 appeals were submitted to the Second Panel in 26 packets, with some packets applying to more than one position. The resulting total scores were adjusted due to demonstrated bias which panel members from one agency (not DNR) showed to individuals employed by that agency.

On May 23, 1991, Petitioner filed a formal appeal with the Personnel Commission claiming his position should be at the Advanced 2 level. After a hearing before an examiner, a proposed decision and order was mailed to the parties on November 22, 1993. In that proposed order, the examiner found that the DER's decision to reallocate Petitioner's position to the Water Resources Engineer-Advanced 1 level rather than the Water resources Engineer-Advanced level 2 was correct. Oral arguments were presented by both parties on January 5, 1994. On April 13, 1994 Respondent adopted the Proposed Decision and Order as the final decision in this matter.[1] On May 16, 1994 Petitioner petitioned this court for review of Respondent's Decision and Order.

STANDARD OF REVIEW

When reviewing an administrative agency's findings under ch. 227, the court will only reverse if the agency's findings are not supported by substantial evidence in the record 227.20(6), Wis. Stats. Substantial evidence is such relevant evidence as a reasonable mind

[1]The Commission did change the second sentence in the last paragraph on page 12 of the proposed decision.

might accept as adequate to support a conclusion. Tatum v. LIRC, 132 Wis. 2d 411, 417, 392 N.W.2d 840 (Ct. App. 1986) (Citations omitted). Review is limited to determining whether the evidence is such that the agency might reasonably make the finding it did. Id. The court must search the record to locate substantial evidence supporting the agency's decision. Id. When more than one inference reasonably can be drawn, the agency's finding is conclusive. Id. The reviewing court cannot evaluate the credibility or weight of the evidence. Id.

DECISION

Petitioner states that Respondent's decision, that the reallocation of his position to a Water Resources Engineer-Advanced 1 was correct, is not supported by substantial evidence. Petitioner further contents that in reaching the decision the agency improperly deviated from the prior practice of giving testimony far more weight than document evidence.

Petitioner specifically disputes findings numbers 20, 21, 22 and 25 as not supported by substantial evidence:

> 20. Mr. Ostenso's position does not compare favorably to Mr. Wedepohl or Mr. Hammers based on the review of the applicable class specifications. His areas of expertise are not as broad in scope as those noted in the positions for Mr. Wedepohl and Mr. Hammers. Mr. Wedepohl has expertise over an entire program (lake restoration) and Mr. Hammers over an entire industry (pulp and paper mill pollution), whereas Mr. Ostenso's focus is narrowed to certain aspects of water pollution. Furthermore, while all three positions provide advice to the industry, outside consultants, outside engineers, etc.; Mr. Ostenso's position focuses on providing consultation to DNR staff at the section and sometimes bureau levels; whereas the in-house consultation provided by Mr. Wedepohl and Mr. Hammers is done on a broader base at the department or division levels.
>
> 21. Mr. Ostenso's engineering work involves multiple engineering disciplines, but not on a cross-program basis.

22. Mr. Ostenso performs the most complex engineering reviews but only relating to his specialty areas which are narrow in scope, as compared to Mr. Wedepohl and Mr. Hammers. The work in unchartered areas is limited to the additives specialty area. He provides direction to other engineers but only in relation to his narrow specialty areas. Similarly, his work with policies, standards, etc.; would occur mainly in his specialty areas. He does function as the chief technical consultant in his specialty area, but again, Mr. Wedepohl and Mr. Hammers have broader-based consultation areas.

25. The class specifications for Water Resources Engineer-advanced 1 best fit Mr. Ostenso's position.

Judith Ann Burke, a Personnel Specialist with the Department of Employment Relations, testified in regards to the reallocation process. (T 130-133). Burke indicated that it was her belief that when originally reallocated, Petitioner was reallocated to a Senior level rather than an Advanced 1 level due to the short amount of time he had been assigned to the unit. (T 132). Burke further testified that in making the determination to reallocate Petitioner to the Advanced 1 level, she looked at the most appropriate level, including those levels below and above what he was requesting: "I would have been aware of the positions that were, at the time, Advanced 2 level positions, so if reviewing his case, something was clicking in my mind that there were a lot of similarities, I would have pursued that further, but I didn't feel that there was enough comparable items to put him in Advanced 2." (T 133). Burke testified that after Petitioner filed his appeal requesting reallocation to the Advanced 2 level she again reviewed whether there was any basis to reallocate Petitioner at the higher level:

> I . . . looked at it again. Started from scratch, so to say, and again compare[d] the position to the class specifications with the Advanced 2 level and what types/kinds of positions were at the Advanced 2 level. Based on my review and all the information that I had, I felt that the Advanced 1 level was best fit for this position." (T 133).

Petitioner disagrees with Finding of fact 20, which states that his position "does not compare favorably" with the positions of Richard Wedepohl and Michael Hammers. (Brief in Support 15). Petitioner states that "given Ostenso's unrefuted proof that he meets the seven Advanced 2 level classification factors, there was no reason for Ostenso to reinforce that proof with proof that his job is comparable to other Advanced 2 level positions." (Id.)

Petitioner's assertion that "there was no reason" to compare his position to other Advanced 2 positions, ignores the process that is used to classify individuals: A position description is reviewed against the desired class specification and those immediately above and below it and then reviewed against types of positions that already occupy the desired class specification. (T 133). The second review, the "whole job match" (T 136), is used to establish a context for the position description review, so that the review of the position description does not occur in a vacuum: "If you have positions that you feel are appropriately classified, you do a whole job match that makes your decision that much [more] clear and more concrete than if you don't have any comparisons." (T 138).

Petitioner further contends in relation to Fact 20 that there is not substantial evidence to support findings that Ostenso's areas of expertise are not as broad as those of Wedepohl and Hammers (Brief in Support 15). Specifically, Petitioner contends that "establishing effluent limits concerns the quality of surface waters throughout the state. That is a specialty area that is broad in scope." (Id.)

Burke testified that she specifically looked at the Advanced 2s at DNR when evaluating whether Petitioner should be reallocated to an Advanced 2 level. (T 138). Burke referred to the position descriptions of Petitioner, Wedepohl and Hammers and determined

that both Wedepohl and Hammer's positions were more broad in scope.

Wedepohl's position summary states:

Direct the technical aspects of the department's statewide lake management efforts; lead professional staff; coordinate the technical aspects of inter and intra department lake related activities; obtain, direct, and manage federal and state grants for general and specific lake improvement and protection projects; develop general and specific policy, design criteria, standards, and procedures for lake improvement and protection practices; serve as the statewide lake management technical expert; serve as a technical consultant to lake communities. Because of expert witness and engineering standards development responsibilities, registration as a professional engineer by the Wisconsin Examining Board of Architect, Professional Engineers, designers, and Land Surveyors is required.

Wedepohl's PD Addendum, in pertinent part, states:

The Lake Management Environmental Engineer position is solely responsible, statewide, for designing specific controls for lake restoration and protection projects and for setting standards for use by engineering firms retained by individual communities to complete specific projects. This engineering position is unique within the state. There are very few established criteria in this field and no comparable peers, hence the decisions made by this person are final.

The position requires the person to be capable of balancing a broad range of program missions and objectives to effectively implement new lake improvement or protection practices. This work would occur when serving either directly as the owners representative or in a liaison, direction setting role between client and the consultant or contractor retained by the client for complex, often multi-million dollar projects.

The person in this key position must have an exceptional level of experience and a broad knowledge of department programs to ensure that the wide variety of related department policies are placed into practice and then implemented using sound engineering principles and practices. Rapidly evolving and changing technologies in the field of lake management also require that the person in this position be experienced with the legislative process and be capable of developing new legislation.

Because of cross-program ties, new statewide lake improvement and protection standards developed by this engineer will often affect numerous other department programs. Cross-program relationships must be maintained with:

Wastewater; Tech Services; Solid Waste; Air; Law Enforcement; Water Reg; Parks; Fisheries; and Wildlife.

To effectively integrate these differing program needs, the engineer must be knowledgeable of the goals and objectives of these and other department programs, keep abreast of proposed changes and be capable of balancing differing needs to minimize conflicts and ensure, to the extent possible, that program goals are complimentary.

In addition to intra-department coordination, the person in this position often works closely with professional in other state and federal agencies. At the state level close working relationships must be developed with the departments of AG, Trade, Consumer Protection and Industry because of their agricultural nonpoint source control programs, and Labor and Human Relations because of their oversight of private wastewater disposal facilities. At the federal level, knowledge of numerous programs within the departments of Agriculture, Interior, and the Environmental Protection Agency is needed because of new emphasis on environmental programs with water quality related goals. Directing new research in this evolving field also requires close ties with scientists at the University level.

Serving on inter-agency workgroups, task forces, acting as the statewide technical expert on lake water quality related issues, and providing testimony to state legislative and congressional committees is part of this person's responsibility.

Given the very limited historical engineering design, practice and procedure guidelines available for the implementation of complex lake management projects, an exceptional level of knowledge and experience is required of the engineer in this position. The employee in this position is expected to exhibit considerable initiative and independence with very limited general supervision by the Lakes Management Section Chief, Water Resources Bureau Director or other program director or administrator overseeing this persons work.

Hammer's position summary states:

Under the direction of the Section Chief, is responsible for the preparation of WPDES discharge permits; review of engineering plans and specifications, and the preparation of applicable portions of Environmental Impact Statements as these actions relate to industrial wastewater control, treatment and/or disposal systems. Serves as lead technical expert for wastewater issues in the pulp and paper industry. Coordinates the development of toxic limitations for all industrial wastewater permits, and serves as the liaison for the Industrial Wastewater Section to the Bureau of Water Resources Management on toxic

issues. Provides guidance and assistance to others in the areas of pulp and paper mills and toxic controls. Develops codes related to pulp and paper, metal finishing and related areas.

Hammer's addendum to his position description states, in pertinent part:

The above referenced position is designated the pulp and paper issuance expert for the Department. The responsibilities of the position are unique among engineering staff in the Bureau of Wastewater Management in terms of the technical knowledge required, the level of the activities performed and the degree of independence.

In addition to the general technical knowledge expected of all engineers in the Bureau of Wastewater Management, the incumbent must have specific knowledge of pulp and paper production technologies and wastewater sources, and of applicable wastewater regulations such as treatment technology based and water quality based effluent limitation rules, wasteload allocation rules, and antidegradation rules. As such, this position will assist the Bureau of Water Resources Management in the development and review of these administrative rules and will.draft portions of those rules as needed, taking the lead role in the process of developing and promulgating the rules. These rules establish the basis for the Department's toxic control program for water resources. Thus, the incumbent must act as the Department's expert on NR 106, which establishes the procedures for calculation of toxic effluent limits for the WPDES program. This is a highly technical administrative code, requiring a close working relationship with the Water Quality Standards and Monitoring Section in the Bureau of Water Resources Management. The incumbent in this position was responsible for the technical drafting of this code over the last three years and now functions as the lead person in the implementation of the code, providing training to the Districts and developing guidance and procedures as needed to communicate to other department staff, the industry and the public.

As coordinator of pulp and paper mill permit issuances the incumbent is expected to facilitate all aspect of the permit issuance process including preparing applications and accompanying instructions, developing procedures for reviewing completed applications, and preparing permit language necessary for the implementation of the applicable rules. These activities must be coordinated with affected Department bureaus and districts, and with EPA, Region V. The incumbent must have knowledge of the Federal regulations impacting on the pulp and paper industry and must work with EPA Headquarters, Effluent Guidelines Division in Washington, D.C. The position is also a contact for various EPA regional staff in Regions 2 (New York). 4 (Atlanta), and 10 (Seattle) when requesting information and advice on

Wisconsin's regulatory program. The product of these activities must be distributed and explained to the Industrial Wastewater Section staff for inclusion in pulp and paper mill permit issuances and be communicated to the Municipal program as well as where the impacts from these decisions may occur.

As the pulp and paper mill expert the incumbent is expected to represent the Industrial Wastewater Section on the pulp and paper industry when dealing with EPA, other states, industry and Department staff. The incumbent is also expected to provide training for Section staff and the Districts on pulp and paper making technologies and applicable regulations. Such dealings may include administrative code development, Department policy decisions and permit reissuance strategy development.

This position serves as the leader of the Department's technology Team for the Pulp and Paper Industry. The pulp and paper tech team is a multi disciplinary group charged with the responsibility of serving as the Department's seat of technical knowledge on pulp and paper making and as an internal consultant to Department programs and external contact with the industry. The Team includes representatives from the Bureaus of Air Management, Solid and Hazardous Waste Management, and Forestry as well as the Office of Operation and Maintenance and two Districts. As leader of the Team, the incumbent will advise the Division Administrator and the Secretary's office on technical and policy issues related to this industry. Duties also include meeting with representatives of environmental regulatory staff of other countries and provinces such as Australia, Norway and Canada, to advise them on the development of appropriate environmental regulations for the paper industry, explaining Wisconsin's program and developing technical data on treatment capabilities as necessary.

Petitioner's position summary states:

This position is responsible for the implementation activities necessary to develop water quality based effluent limitations for the WPDES permit program. This includes developing limitations for conventional, toxic, and organoleptic substances for municipal, and industrial wastewater dischargers throughout the state. This position also includes activities related to the review and revision of rules for determination of water quality criteria and water quality based effluent limitations in accordance with the Clean Water Act. In developing effluent limitations, modeling and evaluating the dispersion and diffusion characteristics in effluent mixing zones is necessary. This position serves as the sections technical expert for zone on initial dilution and mixing zone technology. It is also responsible for coordinating the decentralized review of cooling water additives and serves as the staff expert in assessing

and providing technical assistance to department environmental programs on groundwater dewatering impacts on lakes.

Petitioner's addendum to his position description states:

This position serves as a pivotal role in the Department's water quality program for the State of Wisconsin. The Surface Water Standards Section of the Bureau of Water Resource Management establishes the acceptable water quality levels for all point source discharges to surface waters. These effluent limits are implemented through the WPDES permit process. The effluent limits establish the design criteria to be used in waste water treatment plant construction activities and in development of production processes. The decisions on effluent limits have a direct impact on a primary Wisconsin resource by protecting its quality and usefulness. The effluent limits form the basis for a multi-million dollar public and industry effort to address and comply with surface water quality standards. Water quality based effluent limits are developed for both conventional and toxic pollutants for the protection of:

A. Acute & Chronic toxicity to fish and aquatic life
B. Adverse effect in wildlife
C. Cancer and other effects in humans
D. Organoleptic effects (Taste and Odor)

This position uses knowledge in stream kinetics, analytical chemistry, environmental toxicology, wastewater treatment and statistics for developing water quality based effluent limitations. It is strongly recommended that an engineer in this position be a registered professional engineer. This is crucial since the technical and economic ramifications of the decisions are subject to legal challenge. The position requires strong communication skills in explaining the intricate phases of the limit setting process.

The importance of the water quality standards may result in the position playing a key technical role in the consideration and review of 'special' projects that occur occasionally and are unique. This may include a comprehensive review of a watershed involving multiple dischargers. Project consideration may cross district boundaries, involve a number of district staff and a significant project effort. The increased effort may include bureau resources from the surface water modeling section, groundwater, planning section and the lakes section. Full allocation of surface water assimilative capacity may have to be determined and could result in stringent effluent limits that may impact future development.

The position constitutes one of a limited number of state experts on surface

> water systems with respect to water quality. The holder of the position has attained through experience, exceptional knowledge of the state surface water hydrology and natural water chemistry, toxic chemistry, and engineering expertise for regulating the toxicological impacts to aquatic life, and human water uses. The position must be able to perform in all these areas to address unique and unforeseen circumstances affecting surface water quality.

Burke testified that Wedepohl's position was more broad in scope than Petitioner's as Wedepohl reports to the Natural Resource Administrator indicating a position higher up in the hierarchy (T 139), directs the department's statewide lake management program (T 139), sets statewide standards for the collection of comprehensive lake information and study design and implementation procedures for both department and locally initiated projects (T 139), directs the development of and implementation of statewide classification system for lakes (T 139), provides guidance to federal agencies and develops new lake-related programs (T 139), supervises the conduct of state federally funded lake projects (T 139), prepares, presents, and reviews technical reports to the U.S. EPA, the Department of Agriculture, Department of Interior, U.S. Army Corps of Engineers (T 139), and evaluates the technical adequacy of reports and data submitted by consultants retained by lake organizations and manages research data grants (T 139-140), whereas Petitioner works with permits and is primarily applying the rules and regulations and making recommendations (T 140-141)

Burke further testified that Hammer's position was more broad in scope than Petitioner's as Hammers has oversight of all the industrial wastewater control, treatment and/or disposal systems with the specialization of pulp and paper mills (T 141), coordinates the development of toxic limitations for all industrial wastewater permits (T 141), is the liaison for the Industrial Wastewater section to the Water Resources Management on toxic issues (T 142), has been the sheriff of the pulp and paper industry's technology team (T

142), reports to a Natural Resource Administrator (T 142), makes recommendations specifically to the secretary (T 142), and reviews any complex permits that other people do (T 142).

Finally, the court has not located evidence, testimony or otherwise, that substantiates Petitioner's claim that his work is as broad in scope as that of Wedepohl and Hammers. There is much testimony on the complexity and the importance of Petitioner's work, but it simply does compare to that Wedepohl and Hammers. Therefore, after reviewing the evidence, this court is satisfied that Finding of Fact 20, that Petitioner's areas of expertise are not as broad in scope as Wedepohl's and Hammer's, is supported by substantial evidence.

The Commission specifically found in Finding of Fact 21 that "Mr. Ostenso's engineering work involves multiple engineering disciplines, but not on a cross-program basis. (Proposed Decision and Order at 10). Petitioner states that Finding of Fact 21 is not supported by substantial evidence as uncontradicted record evidence shows that Petitioner's engineering work involves multiple engineering disciplines on a cross-program basis. (Brief in Support 16). In his reply brief Petitioner states,

> The fact that Wedepohl's PD elaborates on his cross-program activities does not provide any support for the notion that Wedepohl, and not Ostenso, should be classified at the Advanced 2 level. Indeed, although neither Ostenso nor DER elicited any testimony concerning Ostenso's cross-program activities, a review of Ostenso's PD shows that his work also involves working on a cross-program basis. (Reply Brief at 7).

After reviewing Petitioner's PD, the court is unable to say that Petitioner's work crosses program lines. Although there is mention in Petitioner's PD that he "participates in a cross-divisional team to develop a new code" (Proposed Decision at 8) and in Petitioner's

addendum that "project consideration may cross district boundaries," the court cannot say that this evidence is enough to find that substantial evidence does not support Respondent's finding. Therefore, the court is satisfied that Finding of Fact 21, is supported by substantial evidence.

The Commission stated in Finding of Fact 22, that Petitioner performs the most complex engineering reviews and in uncharted areas in relation to his specialty, but that these specialty areas are narrow in scope when compared to the work of Wedepohl and Hammers. Petitioner contents that there is no credible evidence to show that his engineering reviews are narrow in scope. (Brief in Support at 16). As discussed above, both Wedepohl's and Hammer's work are more broad in scope than Petitioner's. Specifically, Wedepohl is the state expert and spokesman on complex lake water and quality and comprehensive management issues and this constitutes 85% of his time. Similarly, Hammers coordinates the reissuance of all pulp and paper mill permits and acts as the Department expert for toxic pollutant effluent limitations, which occupies 51% of his time. In contrast, Petitioner is the section's technical expert for zone of initial dilution and mixing zone technology which occupies 25% of his time, while he spends 50% of his time establishing effluent limitations in accordance with the Administrative Code. Further, Petitioner's areas of expertise seem largely based on a management decision within his unit to have the engineers "specialize" due to the highly technical and diverse nature of the work the unit does (T 125),[2] and in an effort for the assignments to be more efficiently handled (T 34) in a cost effective manner.

[2]"There is no way that we can [have] everybody know everything about everything." (T 125).

(T 125). The evidence clearly establishes that Petitioner's work is much narrower is scope than both Wedepohl and Hammers. Therefore, the court finds that substantial evidence supports Finding of Fact 22.

Finally, Petitioner states that Finding of Fact 25, which states that the class specifications for the Advanced level 1 best fit Petitioner's position, is not supported by substantial evidence. (Brief in Support 16). Petitioner states that he has shown how his position meets the seven Advanced level 2 concepts and that Respondent unnecessarily confuses the issue when it considers additional concepts such as the breadth of Petitioner's areas of expertise, whether his work is performed on a cross program basis, and whether his position is comparable to the positions held by Wedepohl and Hammers. (Id.)

As the court has already noted above, the process actually used to reallocate individuals is different than the process Petitioner suggests. The position description is reviewed against the desired class specification in addition to the class above and below it,[3] and then reviewed against types of positions that already occupy the desired class specification. (T 132-133). The second review, the "whole job match" (T 136). is used to establish a context for the position description review, so that the review of the position description does not occur in a vacuum (T 138).

The class specifications that Petitioner's position was reviewed against are as follows:

> Water Resources Engineer - Senior: This is senior level water resources engineering work. Employees at this level differ from lower level positions in that the engineer develops and follows broadly defined work objectives and the review of the work is limited to administrative evaluation by the supervisor.

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[3]The specifications are kind of building blocks, and one level is built on top of another. (T 133).

Positions at this level have extensive authority in carrying out their assigned responsibilities. This involves independently implementing the assigned responsibilities. The work performed at this level requires a high degree of interpretation and creativity in evaluating engineering aspects of new technologies. The engineer may be considered an expert in a segment of the program (i.e., specific type of computer model, specific effluent limitations), which has program wide policy impact, but is not of the significance as found at higher levels. Positions at this level typically have responsibilities for developing limitations for conventional, toxic, and organoleptic substances for municipal and industrial wastewater dischargers; developing complex computerized water quality and hydraulic models for major river segments and developing and updating wasteload allocations; developing statistical techniques for assessing toxicological data; developing policy recommendations or procedures for implementing water quality standards in regulating point sources; assessing treatment technologies and capabilities in comparison to water quality needs; or serving as the primary engineer for a specific segment of the program. Positions at this level make decisions independent of supervisory oversight, but carry out work responsibilities under the general direction of program managers.

Advanced 1: This is very difficult advanced water resource engineering work. Employees in this classification will typically serve as the department expert in a broadly defined segment of the water resource program. The area of responsibility will normally cross program boundaries, require continually high level contacts with private consultants, municipal officials, directors of public works, city administrators, industry officials and engineers for major industries regarding highly sensitive and complex engineering reviews and have significant program wide policy impact. The area of expertise will represent a an important aspect of the program, involve a significant portion of the position's time and require continuing expertise as the field progresses. The knowledge required at this level include a broader combination than that found at the Water Resource Engineer-Senior level. Assignments are broad in scope and continually require the incumbent to use independent judgment in making professional engineering decisions. Positions at this level make independent decisions and perform work in response to program needs as interpreted by the employee with the work being reviewed after the decisions have been made.

Advanced 2: This is very difficult complex professional water resource engineer work. Employees in this class continually perform the most complex engineering reviews for the assigned area. The work assigned is typically in unchartered areas with essentially no guidance to follow. Employees at this level typically provide direction to other engineers assigned to the project. Work involves the development of policies, standards, procedure development, evaluation and administration. Employees at this level function as the chief

technical consultant. Employees at this level are delegated authority to make the final engineering decision.

In testifying on why she thought that the Advanced level 1 was the best fit for Petitioner's position, Burke went through and compared Petitioner's PD to the Senior class specifications first:

> It indicates that employees at the Senior level are working independently, that that level requires a high degree of interpretation; creativity in evaluating in the engineering aspect of new technology; they're considered an expert in the segment of a program. . . . Positions at this level typically have responsibilities for developing limitations, for conventional toxic and organoleptic substance from this municipal and industrial wastewater discharges. And Petitioner's position description, Goal A, 50% is independently effluent notations for controlling conventional tox-- and organoleptic substances. So that's a good fit. . . . Developing complex, computerized water quality and hydraulic models for major river segments. His Goal B, which is 10%, performs and operates new and existing dispersions, diffusion, and water quality-based models, as necessary, for selected water. So this fits. . . . Developing policy recommendations or procedures for implementing water quality standards. Goal E is developing and revising water quality criteria. Goal D [is] participating in formal review process for water quality variances. Anyway, it goes on to say several things that he has . . . on his position description. (T 134).

Burke then compared Petitioner's PD to the Advanced level 1 class specifications.

> Then he goes to the Advanced 1. Okay, it's more difficult advanced water resources engineering work. Service and expert in the broadly defined segment of Water Resources program. The area of responsibility will normally cross program boundaries . . . requires continually high level contact with private consultants, municipal offices, Director of Public Works, administrative, etc. He did [say] . . . I believe, that he did do applications for the users and that could be the municipalities or industries. . . . And they have an area of expertise, which I believe he testified to . . . the cooling additives and mixing zones. (T 134-135).

Burke testified that she felt that the Advanced 1 level was a good fit: "This is higher than the Senior level. . . . [T]hey [are] kind of building blocks, since the Advanced 1 level is a broader combination than found with the Senior level. The assignments are broad in scope

and continually require the incumbent to use independent judgment in making professional engineering decisions. . . ." (T 135). Burke further testified that the position descriptions of Thomas A. Bennwitz and James W. Schmidt[4] played a significant part in her determination that the Advanced 1 level was the appropriate classification for Petitioner's position due to the major similarities. "Well they're not exactly the same. . . . Mr. Schmidt does have the Superfund. . . . Mr. Bennwitz has the Milwaukee Harbor estuary . . . . The majority of the job appears to be the same, and they have different areas of expertise, different specialty areas." (T 136-137). Finally, in doing a whole job match with Petitioner and Schmidts' PDs,[5] Burke felt that the Advanced 1 level classification was correct. (T 138). From a review of the evidence, the court is satisfied that Respondent's Finding of Fact 25, that the class specifications for Water Resources Engineer-Advanced 1 bets fit Petitioner's position, is supported by substantial evidence.

Petitioner also contends that Respondent's decision was an unjustifiable deviation from the established Commission practice of placing far more weight on the credible evidence presented by subject matter experts than on language in position descriptions. Petitioner cites Smith v. DER, 91-0162-PC (11/29/93), in support of this contention. Petitioner states that this court must reverse or remand Respondent's decision if the decision resulted from an unexplained deviation from Commission precedent. §227.57(8).[6]

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[4]Bennwitz and Schmidt are two of Petitioner's co-workers in his unit.

[5]Burke was unsure whether she had compared Petitioner's PD to that of Bennwitz.

[6]227.57(8) The court shall reverse or remand the case to the agency if it finds that the agency's exercise of discretion is outside the range of discretion delegated to the agency by law, is inconsistent with an agency rule, an officially stated agency policy or a prior agency practice, if deviation therefrom is not explained to the satisfaction of the court by the agency;

In Smith v. DER, an appeal was taken by James B. Smith[7] of the reallocation of his position to Civil Engineer-Advanced 1 rather than Civil Engineer-Advanced 2 by the Department of Employment Relations. Smith v. DER, 91-0162-PC at 1 (11/29/93). During the course of Smith's appeal, his position was compared against nine different position descriptions of other individuals in a variety of agencies that were either Advanced 1s or Advanced 2s. Id. at 13 -18. In addition, testimony was taken from a number of individuals with varying degrees of familiarity with Smith's position. Id. at 20. Two individuals that were deemed to have the most familiarity with Smith's work, and whether it would meet the Advanced 2 classification requirements, were James Hafner and Melvin Sensenbrenner, two Advanced 2s in the Facilities Needs Analysis Section of the Department of Health and Human Services (DHSS). Id. The Commission stated that "As incumbents, they obviously have the most familiarity with their own jobs. In addition, they work fairly closely with appellant, and are reasonably knowledgeable about his position from that perspective." Id.

After analyzing the evidence, opinions of the aforementioned incumbents, and the arguments of record concerning the comparisons of the positions descriptions, the Commission concluded that Mr. Smith had established by the preponderance of the evidence that his position compared favorably enough to those of incumbents Hafner and Sensenbrenner to justify it being classified as an Advanced level 2 rather than an Advanced

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or is otherwise in violation of a constitutional or statutory provision; but the court shall not substitute its judgment for that of the agency on an issue of discretion.

[7]Mr. Smith worked in the Department of Industry, Labor and Human Relations (DILHR).

level 1 Id. In so concluding, the Commission stated that

> the Commission places far more weight on the Facilities Need Analysis Section **position comparison** than on the other **position comparisons**. This is because of the general **similarities between the positions**, and because of the particular **expertise that can be brought to this comparison** by the incumbents, who actually work on a regular basis with appellant. The Commission can place a good deal more confidence in such an assessment than one based on position descriptions and necessarily second hand knowledge. Therefore, while there are arguments and comparisons that support both side to this controversy, in the Commission's opinion, appellant has sustained his burden of proof and established that the decision to reallocate his position to Civil Engineer Advanced 1 was erroneous, and his position is more properly classified at the Civil Engineer Advanced 2 level. Id. at 26-27 (emphasis added).

Petitioner cited the Smith case for the proposition that "It is established Commission precedent that in job classification appeals the Commission gives far more weight to evidence provided by witnesses with first hand knowledge on the position(s) being considered than it does to the language and position descriptions." (Brief in Support at 5.) The court does not believe that there is any language in the Smith case to support Petitioner's proposition. Therefore, the court finds that Petitioner's arguments based on §227.57(8) are without merit.

CONCLUSION

The court finds that Respondent's decision which dismissed Petitioner's appeal to be reallocated from a Water Resources Engineer-Advanced 1 classification to a level 2 classification is supported by substantial evidence. Further, the court finds that Petitioner's claim that the agency deviated from prior agency practice is without merit. Therefore, Respondent's decision is AFFIRMED.

IT IS SO ORDERED.

Dated this 18th day of March, 1996.

By the Court:

Case No. 94 CV 1571
George A.W. Northrup, Judge
Circuit Court Branch 14

cc: AAG John D. Niemisto
Attorney Richard Thal