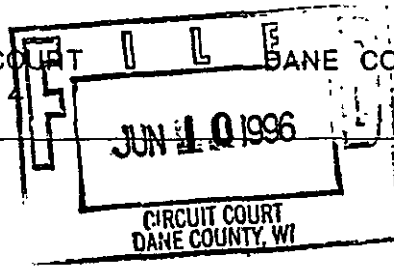


appeal from Lulloff v DER, 90-0347-PC,
4-19-94

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JH

STATE OF WISCONSIN

CIRCUIT COURT DANE COUNTY
Branch 4



D41

ALAN R. LULLOFF,

Petitioner,

vs.

WISCONSIN PERSONNEL COMMISSION,

Respondent.

MEMORANDUM DECISION
AND ORDER
(Admin. Review)

Case No. 94-CV-1633

This is a judicial review of a decision by the Wisconsin Personnel Commission rejecting petitioner Lulloff's bid to have his engineering position given a higher civil service classification. Because the Commission's decision is free of material legal errors and supported by substantial evidence, that decision is affirmed.

REVIEW OF RECORD

From 1988 to 1990, the Department of Employment Relations reclassified all engineers employed in the classified service of the State of Wisconsin. To do this, DER first surveyed all of the engineers and, working with the various state agencies, identified positions which were representative of the engineering work done in each agency. A panel of thirteen experts evaluated 77 representative engineering positions from twelve agencies. The 77 "benchmark" engineers filled out questionnaires requesting information relating to several different work characteristics. The characteristics were weighted and each of the 77 engineers was assigned a score. Then, each

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engineer was classified according to score into different classification levels.

All other engineers were evaluated by comparing them to these classification levels. Each engineering position would be evaluated by its agency, using a methodology approved by DER, and the result would be submitted to DER which would assign a classification. DNR used the method called "whole-job analysis."

Agencies generally wrote the classification specifications for their own engineers, subject to the approval of DER. R.9 at 187. The various engineering positions were arranged according to rank -- Entry, Developmental, Journey, Senior, Advanced 1 and Advanced 2.

Petitioner Alan Lulloff works at the Department of Natural Resources. He is the chief engineer for DNR on floodplain matters and is responsible for floodplain zoning, mapping and analysis. Under the reclassification scheme, Lulloff's position was ultimately classified as a Water Regulation and Zoning Engineer -- Advanced 1, the second highest classification.

Not satisfied with the classification, Lulloff filed an informal appeal with DER to obtain classification at Advanced 2, the highest classification. A second panel of experts was convened to consider such appeals. The panel did not consider the positions with respect to a classification's particular specifications but, instead, reviewed information submitted about the positions and scored them in a matter similar to the original evaluation of the benchmark

engineers, albeit with a consideration of additional information. Lulloff's position was scored at the Advanced 1 level.

Lulloff appealed the determination to respondent Wisconsin Personnel Commission. WPC held a hearing on the matter on January 14, February 21 and February 24, 1992. A partial stipulation was entered into on July 21, 1992.

A proposed decision and order was mailed to the parties on November 22, 1993. In it, WPC upheld the classification of Lulloff's position at Advanced 1. In addition to upholding the second panel's score, WPC compared Lulloff's position with that of Richard Wedepohl, another DNR engineer involved in water related activities, whose position was rated by the evaluation panel as the lowest scoring position to qualify for Advanced 2 status. WPC found that Wedepohl's position carried more broad ranging responsibilities than Lulloff's. WPC also found that the class specifications for Advanced 1 were the best fit for Lulloff's position.

On February 2, 1994, the parties presented oral arguments to WPC based on the proposed decision.

On April 19, 1994, WPC issued a final decision and order which adopted the proposed decision with minor modifications. Lulloff now seeks reversal of that final decision in this judicial review.

Additional portions of the record are discussed in the Conclusions of Law.

CONCLUSIONS OF LAW

Lulloff contends that WPC's classification of his position as Water Regulation and Zoning Engineer -- Advanced 1 rather than Advanced 2 is erroneous and not supported by substantial evidence.

The Court's review of the decisions of administrative agencies is strictly limited by law. The Court may set aside agency decisions which are not supported by substantial evidence or which are marred by material procedural errors, legal errors, abuses of discretion or inconsistencies with established agency policies. Secs. 227.57(4), (5), (6), (8), Stats.

The Commission's findings of fact shall be upheld if supported by substantial evidence. Sec. 227.57(6), Stats. Substantial evidence is such evidence as a reasonable mind might accept as adequate to support a conclusion. Bucyrus-Erie Co. v. DILHR, 90 Wis.2d 408, 418 (1979). Inferences drawn from the facts will be upheld so long as reasonable. Voc. Tech. & Adult Ed. Dist. 13 v. DILHR, 76 Wis.2d 230, 240 (1977). The Court shall not substitute its judgment for that of the agency with regard to the weight or the credibility of the evidence. Sec. 227.57(6), Stats.; Bucyrus-Erie Co., 90 Wis.2d at 418.

In reviewing questions of law, although the Court is not bound by the agency's determination, the agency's expertise will be accorded due weight. DOR v. Milwaukee Refining Corp., 80 Wis.2d 44, 48 (1977). Where "the agency has particular competence or expertise in the matter at hand, we

will sustain its legal conclusions as long as they are rational." Nelson Bros. v. DOR, 152 Wis.2d 746, 753 (Ct. App. 1989).

In this case, determining the work duties of Lulloff, or any other engineer, presents questions of fact. The ultimate determination of whether Lulloff's duties best fit the class definition of Advanced 1 or Advanced 2 is an issue of law. See Nottelson v. DILHR, 94 Wis.2d 106, 115-16 (1980) (determining conduct is a question of fact; applying conduct to a standard is a question of law).

However, even as to the questions of law presented in this case, the Court must accord substantial deference to WPC's decision. The responsibility of designating classifications to state jobs in the classified service is assigned by statute to the Secretary of Employment Relations and WPC. Secs. 230.09(2)(a); 230.44(1)(b), Stats. Application of facts to standards often call for the making of value judgments. Nottelson, 94 Wis.2d at 117. Courts should hesitate before disturbing these value judgments and, though not controlling, the agency's expertise leading to these value judgments should be given weight. Id.

With respect to the particular topic at hand, courts have traditionally accorded great deference to a civil service commission's classification of positions. 67 C.J.S. Officers & Public Employees, sec. 56c at 349-50 (1978) (classifications only reversed if arbitrary or unreasonable); 15A Am. Jur. 2d Civil Service, sec. 22 at 31-32 (1976) (abuse of discretion standard); 3 McQuillin Municipal Corporations,

sec. 12.77 at 388 (3d ed. 1990) (civil service commission exercises wide discretion in classifying positions). Thus, the Court in this case must give substantial deference not only to WPC's findings of fact but to its interpretations of the classification qualifications at issue in this case.

Though there is a dispute as to the significance of some of Lulloff's duties, his basic job description is not disputed.

Mr. Lulloff performs floodplain engineering tasks. State law requires state-employed engineers who perform and review floodplain studies to be licensed as professional engineers, a requirement which Mr. Lulloff satisfies. His job involves complex engineering judgments and such judgements are final. The administrative codes applicable to his work provide general guidance but numerous and significant professional judgments still must be made. His floodplain engineering analyses require knowledge and expertise used in various engineering fields. For example, the dam-breaking modelling requires (but is not limited to): 1) knowledge of the structure of dams to determine potential weaknesses to predict how the dam might fail and how long each potential weakness may take to fail under various circumstances (such as rainfall rates), 2) knowledge of soil absorption rates, 3) knowledge of hydraulic gate operations, and 4) knowledge of lake-management engineering such as hydrology, flow characteristics, and quantity of water coming into the lake. The engineering analyses he performs involves engineering tasks related to land and lake-management issues. His work often requires on-site inspections to verify the accuracy of his analyses. . . . The floodplain-mapping and computer modelling are uncharted areas.

Proposed Finding #18.

Lulloff spends about 25% of his time operating as the DNR expert on floodplain engineering issues. This includes providing technical training and assistance to government agencies and consultations to private interests. He is also in charge of developing floodplain mapping standards, which

requires working with local government units. Id.

Lulloff spends 15% of his time developing a computerized system to interphase various engineering models with an existing data base system known as Geographical Information System. The purpose of this endeavor is to enhance accuracy in floodplain area predictions and mapping. "This is innovative work not done anywhere in the nation." Id.

Lulloff devotes 45% of his time to supervising student interns in data gathering and management; serving as the Chair of the DNR Bureau of Water Regulation and Zoning's Information Management Committee, which integrates all mapping and engineering data generated by the Bureau; representing the Bureau on DNR's Water Integration Committee and the Information Management Subcommittee; performing floodplain studies; and reviewing federal floodplain plans, studies and maps and approving them for state use and consistency with state standards.

Lulloff also spends 10% of his time developing and interpreting statutes, rules, court decisions and policy statements related to the floodplain management program. He spends 5% of his time involved with flood mitigation and documentation. He devotes 5% of his time to enforcement activities related to his field. Id.

The question presented to WPC was whether the job duties just described were better classified as Water Regulation and Zoning Engineer -- Advanced 1 or Advanced 2. These class specifications are set forth in Proposed Finding #16 which is undisputed.

ADVANCED 1: This is very difficult advanced water regulation and zoning engineering work. Employees in this classification will typically serve as the department expert in a broadly defined segment of the water regulation and zoning program or a districtwide expert with multi-faceted responsibilities. The area of responsibility will normally cross program boundaries, require continually high level and complex contacts with a wide variety of government entities, businesses, industry and private citizens regarding highly sensitive and complex engineering reviews and have significant programwide policy impact. The area of expertise will represent 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 [sic] a broader combination than that found at the Water Regulation and Zoning Engineer -- Senior level. Assignments are broad in scope and continually require the incumbent to use independent judgement in making professional engineering decisions. Positions at this level make independent decisions and perform work in response to program needs as interpreted by the employe with the work being reviewed after the decisions have been made.

ADVANCED 2: This is very difficult, complex professional water regulation and zoning engineer work. Employees in this class continually perform the most complex engineering reviews for the assigned area. The work assigned is typically in uncharted 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.

See R.11, Resp. Ex. 1 at 6.

The line between the two classifications is fine. Generally, the Advanced 2 position requires work which is more complicated or groundbreaking than Advanced 1. Also, WPC reasonably interpreted the Advanced 2 position as including final policy making or administrative work which is not part of an Advanced 1 position. WPC also reasonably determined, contrary to Lulloff's wishes, that a position

should not be assigned to Advanced 2 merely because some of its work is Advanced 2 work. It is also not enough that the position calls for the exercise of professional judgment in complex and important situations with cross-program implications because Advanced 1 also calls for such work. Thus, the question reasonably framed by WPC was not whether Lulloff performed complicated work or made important decisions but whether he did so over a sufficiently wide field as to qualify for Advanced 2.

At the outset, Lulloff observes that WPC's arguments in its brief are somewhat at variance with its decision with respect to certain findings favorable to him. Of course, the Court here reviews WPC's decision and not its brief. It is not part of the scope of review here to revisit facts found favorably to Lulloff. As the Court reads it, WPC's decision did not rest on determinations that Lulloff did not perform sufficiently complex work, that he did not perform work in uncharted areas, or that his work lacked complex personal contacts. See Proposed Finding #23 which recognizes the significance of his work in those areas. Rather, the essence of the Commission's determination was that Lulloff's field of expertise and his area of policy making discretion was not sufficiently broad to justify Advanced 2 classification. Proposed Findings ##24-26.

Lulloff raises no objections with respect to the definitions of the classifications. He does not challenge the general methodology used by the DER panel or by WPC in evaluating his position. Instead, he asserts that the panel

and WPC's application of that methodology to his case was erroneous in certain respects or not supported by substantial evidence.

Lulloff's first allegation of error relates to the score assigned to his position. Each position was evaluated as to nine factors which were weighted in the following order from most to least consequential -- knowledge, complexity, discretion, effects of acts, consequence of errors, personal contacts, physical effort, hazards and surroundings. Proposed Finding #12. The scores of each member of the panel were averaged to arrive at the final score, although the scores were adjusted because it was determined that one panel member was biased in favor of the engineers in his or her agency. Lulloff's scores were 422.1 "total" and 416.5 "adjusted total." This compares to the scores of another DNR water engineer, Richard Wedepohl, whose scores, 446.9 "total" and 441.4 "adjusted total," were determined to be the lowest to qualify for Advanced 2 status. The adjustments had no material affect on the relationship between Lulloff and Wedepohl's scores and are not an issue in this case.

Lulloff argues that his score was unfairly pulled down by a panel member who gave him a score which was only 72% of the average that other panel members gave to him. He contends that DER statistician Tony Milanowski testified that a score needed to be 80% of the average to be acceptable. However, Milanowski only testified that 80% was acceptable, not that it defined the limit of acceptability. R.12 at 47, 49. He also testified that scores beyond the acceptable

range were not automatically dropped but further investigated to find an explanation for the discrepancy. R.12 at 64. Moreover, Milanowski testified that bias is evaluated with respect to a rater's overall scoring pattern rather than for any particular score to a particular individual. Aberrations with respect to individual scores are more likely to be random rather than biased and fishing expeditions questioning them should be avoided. R.12 at 84. In short, Lulloff's premise that a single low score itself demonstrates bias is incorrect.

WPC's refusal to exclude the low score was not erroneous. In addition to relying on Milanowski's testimony that bias should be established by analyzing a rater's overall scores rather than individual scores, WPC noted that dropping Lulloff's low score would also require analysis of every engineer to see if their low score should be dropped. Otherwise, Lulloff would be accorded special treatment.

Lulloff contests WPC's further assertion that the rater is not identifiable. He asserts that the low rater was one of two DNR raters. However, Lulloff presents no evidence that either of these raters were biased against him or that their scores were inappropriate in any way. Lulloff's assertion, Br. at 13, that it was up to DER to prove why the low score should not have been eliminated is incorrect.

Lulloff next contends that the rating panel and WPC improperly ignored his work as a leadworker and supervisor. In formulating the scores of candidate engineers, the panel employed the Wisconsin Quantitative Evaluation System which

was developed by DER to make classification determinations in borderline cases. R.11, Resp. Ex. 1, sec. 1.F. This system breaks down job requirements into ten different factors, the nine cited previously which were actually used here and a category of "supervisory responsibilities" which was not used because, as WPC noted, such responsibilities were not part of the class specifications specifically pertinent to Engineer -- Advanced 1 or Advanced 2. Final Dec. at 5.

The Court sees no material error in the determination not to give Lulloff a separate score for his lead or supervisory work. The Wisconsin Quantitative Evaluation System appears to be a standard system developed for the evaluation of all professional positions in the classified service. R.11, Resp. Ex. 1, secs. 1.E., 1.F. It is fundamental to the civil service commission's discretion in making classifications that it have the authority to adapt standards to the particular position at hand.

Significantly, "[t]he survey panel did not score any leadworker position for the factor of supervisory responsibilities." Final Dec. at 5 (emphasis added). Thus, Lulloff, seeks to be accorded different treatment than other candidates for the Advanced 2 classification.

Moreover, Lulloff's assertion that separate scoring of his lead and supervisory work would entitle him to Advanced 2 classification is purely speculative. Lulloff supervised two engineering student interns and a management information specialist. He did not supervise any engineers. WPC considered Lulloff's supervisory duties in its independent

determination of whether his position fit the definition of the Advanced 2 position and gave those duties the weight it thought they deserved. Final Dec. at 5. The Court is simply not convinced by Lulloff's conclusory assertions that separate consideration of his supervisory work would have had any realistic potential of increasing his ranking.

Lulloff alleges a number of other flaws in the panel's scoring of his position in an appendix attached to his brief. It is not clear which, if any, of these other issues are being pressed on this review. In any event, Lulloff has not offered more than conclusory assertions that he would have ranked higher if these flaws, if flaws they were, had been corrected.

Determining that there were no defects in the methodology used in scoring Lulloff's position, WPC compared Lulloff's work with fellow DNR engineer, Richard Wedepohl, who had the lowest score for qualification at the Advanced 2 level. Although Wedepohl is a Water Resources Engineer, a type of Engineer which is separately defined, the class specifications at the Advanced 1 and Advanced 2 levels are substantially similar to those of Lulloff's Water Regulation and Zoning Engineering position. Compare R.11, Resp. Ex. 1 at 6 (Water Regulation) with R.10, App. Ex. 55 at 6-7 (Water Resources). Lulloff does not dispute that it was appropriate to compare his position with Wedepohl's in determining whether he also qualified for Advanced 2 status.

Wedepohl's general job description is also not disputed.

Mr. Wedepohl's position is classified as a Water

Resource Engineer at the Advanced 2 level. His position is located in DNR's Division of Environmental Quality, Bureau of Water Resources Management in the Evaluation and Special Projects Section. He 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. Few established criteria or guidelines exist leaving the majority of his work in uncharted areas. Specific cross-program ties include: Wastewater (discharge to lakes); Tech Services (laboratory certification), Solid Waste (landfill sitings, hazardous waste cleanup), Air (atmospheric deposition of mercury, PCB's, nutrients); Water Regulation (shoreland zoning and Ch. 30 permits), Parks (management of lake use and park grounds); Fisheries (stocking and habitat improvement practices), and Wildlife (wetland habitat management, new sit [sic] construction).

Proposed Finding #13.

In particular areas, Wedepohl spends 35% of his time directing the development of a comprehensive, statewide lake management program, including lake restoration and protection projects, and providing guidance to federal agencies in that field. Id. Fifteen percent of Wedepohl's time is spent on supervising lake protection and improvement projects and obtaining and managing grants for them. Id. Wedepohl devotes 25% of his work to providing engineering direction and consultative services to lake organizations and other agencies, state and federal. This work covered all aspects of lake management strategy. Id. Another 25% of Wedepohl's work is devoted to serving as the primary state expert and spokesman on lake water quality and water management issues. Id.

Lulloff argues at length that the panel and WPC erred in rating his engineering position as less advanced than Wedepohl's. He challenges several of WPC's findings related

to that issue. As the standard previously discussed makes clear, the Court does not operate on a clean slate. To reiterate, the Court must not reweigh the evidence nor will it disturb WPC's reasonable interpretations of the classification definitions. WPC is the expert in this matter, not the Court. Under that standard, the Court sees no error in WPC's determination that Lulloff's position was not entitled to the same Advanced 2 status as Wedepohl's.

Wedepohl is the chief lake management engineer in the State and has the final say as to how the State's lake management engineering projects should be handled. His work has an impact on and requires coordination with many other state programs. Without, denying the significance of Lulloff's work, it was reasonable for WPC to conclude that it was not as advanced as Wedepohl's. Much of Lulloff's work appears to be primarily consultative and advisory, rather than policy and decision making. He is the final policy and decision maker only in the field of floodplain mapping and analysis. His cross program contacts are in that field and in the area of information management. Lulloff's cross program ties and policy making authority may be significant in these limited areas. However, he offers no reason to disturb WPC's findings that these fields are considerably narrower than Wedepohl's lake management responsibilities other than his disagreement with that assessment. That is not enough.

As WPC noted, Proposed Dec. at 11, Lulloff had the burden of proving that he was entitled to the higher

classification, a point not disputed here. Whether Wedepohl's lake management duties are broader than Lulloff's floodplain duties is a question peculiarly within the province and expertise of DER and the Commission. Despite lengthy descriptions of his job duties, Lulloff offers little insight on the critical question of whether Wedepohl's field of expertise and discretion is broader than his. Thus, any attempt by the Court to disturb their findings in this regard would amount to little more than a second guess. From the Court's lay perspective, it appears that Wedepohl's lake management duties had a more profound, direct and broader impact on the face of the land and waters of Wisconsin than Lulloff's duties, which, apart from mapping and analysis, appear to have been limited to the narrow scope of reviewing projects for conformity with floodplain standards, just one of the many factors which would have gone into the development and execution of these projects. In any event, it was certainly reasonable for the Commission to conclude that Lulloff had not met his burden of proof on the matter.

The determination that Wedepohl operated as a decision maker and policy maker in a broader area than Lulloff was by far the greatest factor which led the panel to give him a higher score than Lulloff in the position evaluation and in WPC's approval of that score. Having affirmed the underlying finding that WPC could find that Wedepohl's position had broader policy and decision making authority, the Court cannot disturb the reasonable inferences drawn from that underlying finding, that Wedepohl was entitled to a higher

score in several categories.

It is of no avail to Lulloff that his work may have called for the performance of engineering tasks which were at least as advanced as Wedepohl's. The panel gave Wedepohl the same score as Lulloff with respect to complexity of tasks and physical effort and even gave him a higher score in the exposure to hazards and consequence of error categories -- the latter due to the risk of injury and property damage which would result from building in a floodplain. Proposed Finding #12. WPC did not question these scores.

Rather, it was because Wedepohl was the policy maker in a broader field that he scored higher in other areas. Thus, in approving the panel's score on the subject, WPC found that Wedepohl's job required not greater engineering knowledge in particular, but greater knowledge of other programs as they related to his own. Proposed Finding #19. Similarly, Wedepohl scored substantially higher than Lulloff in the "discretion" category because of his broader policy making authority. Id. Interestingly, Lulloff makes only the most summary challenge to Finding #19, Br. at 15, yet Wedepohl's higher scores in these two categories provided the bulk of the difference between Wedepohl's score and Lulloff's. Proposed Finding #12. These broader policy making responsibilities also justified Wedepohl's higher scores in the "effect of actions" and "personal contacts" categories which added to the gap between the scores. Proposed Finding #20.

In addition to comparing Lulloff's scores with Wedepohl,

WPC also used the comparison in making an independent review of whether Lulloff's position met the specific class specifications for Advanced 2. Here again, Wedepohl's broader field of expertise, policy making and program management authority were crucial. Proposed Finding ##24-26.

Lulloff's argument, Br. at 17, that it was error for WPC to focus on the breadth of an engineer's responsibilities and their cross program impact ignores the clear language of the specifications. One of the key distinctions readily apparent in any fair reading of the Advanced 1 and the Advanced 2 classifications is the greater policy, administrative and final decision making responsibility accorded to an Advanced 2 engineer. Advanced 2 "[w]ork involves the development of policies, standards, procedure development, evaluation and administration" and "authority to make the final engineering decision." Advanced 1 work involves only "significant programwide policy impact" which is ultimately subject to review. Proposed Finding #16. At any rate, ranking a position according to breadth of field and discretion is a matter of common sense. Thus, the higher, Advanced 2, engineering classification may be awarded to the incumbent of a position which has greater program management, and policy and decision making authority, even if it does not require the application of more advanced engineering skills than the incumbent of the lower, Advanced 1, position.

The Court notes that breadth of field is not necessarily dispositive of the determination of whether a position should be classified at Advanced 1 or Advanced 2. There are other

specifications in the class definition and, as the Commission notes in its brief, at 15, classifications are made by evaluating the positions as a whole. However, as already noted, the primary difference between Lulloff and Wedepohl, whom Lulloff does not dispute to be a valid comparison with him, was that the latter operated in a wider field with more far ranging discretionary, decision making and coordination responsibilities.

Lulloff asserts that WPC erred in determining that Wedepohl had greater program management responsibilities than him. However, Lulloff points to nothing in the record which indicates that his decision and policy making authorities extended beyond floodplain zoning, mapping and analysis. WPC recognized Lulloff's authority in this field and that Lulloff operated without guidance and in uncharted areas related to it, but simply concluded that Lulloff's area of expertise and policy making was not as broad as Wedepohl's lake management responsibilities. This conclusion was reasonable. In any event, the Court is in no position to disturb this determination because doing so calls for a re-weighing of the evidence and the application of value judgments on matters in which WPC is the expert, not the Court.

The Court also notes that the example of "direction" of other engineers given by Lulloff to the U.S. Army Corps of Engineering, also involves the field of floodplain analysis and is limited to a request to gather and analyze information in a certain way. R.10, App. Ex. 16. Lulloff also testified that he provides direction on floodplain issues to other

engineers involved in construction. R.9 at 27-28. However, Lulloff never makes clear how disputes are resolved, for example, if local engineers or construction engineers disagree with his assessments. In any event, the Court sees nothing in this work, whether it may be characterized as directing other engineers or merely advising them, which WPC failed to recognize.

The remainder of Lulloff's challenges to the findings of fact are also related to his belief that WPC erred in determining that Wedepohl operated in a broader field with more policy making authority in that field. These arguments are simply a reframing of matters already addressed by the Court and require no different result.

Lulloff next contends that WPC deviated from its established practice of placing more weight on the credible evidence of subject matter experts than on the language in position descriptions. This allegedly violated sec. 227.57(8), Stats., which requires the Court to reverse or remand for an agency's unexplained deviations from agency practice.

Lulloff's argument fails in the first instance because the so-called policy of weighing the evidence of expert witnesses is a question of the weight of the evidence which is beyond the Court's scope of review. Sec. 227.57(6), Stats. Sec. 227.57(8), Stats., also expressly states that the Court shall not substitute its judgment for that of the agency on matters of discretion and deciding whether or not to accept expert evidence certainly falls in that category.

Second, the sole authority cited for the proposition does not assert that the Commission must rely on subject matter experts; it merely says that the Commission "can" rely on those experts. Smith v. DER, Case No. 91-0162-PC, prop. slip op. at 26 (WPC Nov. 29, 1993). Smith primarily involved an assessment of the relative complexity of the engineering tasks at hand. As discussed, above, the relative technical complexity of Lulloff's work was recognized by WPC and by the scoring panel which gave Lulloff the same score as Wedepohl on that factor. Also, the experts testifying in Smith were incumbents to the higher classified positions who actually worked with the claimant and, so, were in the best position to compare their work to his. Prop. slip op. at 20-21. There is nothing in Smith which establishes a policy of deferring to engineering experts as to the overall evaluation of the classifications and the Court does not see any reason why the Commission should abdicate its fact-finding and interpretive authority to experts.

Finally, Lulloff contends that WPC erred in failing to compare his position with that of Gerald Burns, a Department of Transportation Regional Construction Engineer who successfully obtained Advanced 2 status. This argument is based on the testimony of Rich Vogt, who occupied positions similar to both Lulloff and Burns. R.9 at 134. Vogt testified that the positions were comparable with respect to the complexity of the engineering tasks performed. R.9 at 135-36.

As WPC noted, Burns was a Civil Engineer and not a Water

Regulation and Zoning Engineer. It certainly was within WPC's province to determine that a comparison of the two positions would not be useful. As WPC noted, the class specifications for civil engineers is different. See R.13 , Ex. 5 at 7-9 for Civil Engineers -- Advanced 1 and Advanced 2 specifications. While it appears that the engineering involved in the Department of Transportation position is no more complex or innovative than the floodplain engineering work, according to Vogt, "under the Construction Engineer position you were responsible for construction." R.9 at 137. Thus, it appears, at least, that the position carried administrative responsibilities concerned with executing construction projects which are not comparable to any duties Lulloff performed.

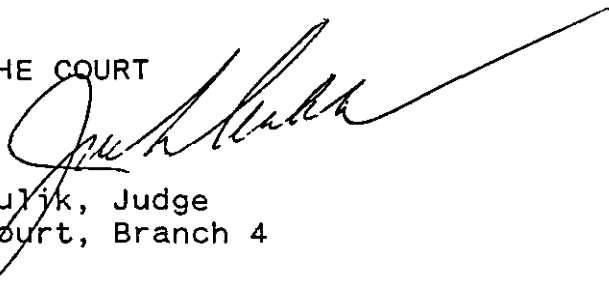
In conclusion, what Lulloff seeks here is nothing less than to have the Court second guess WPC on matters in which the Commission is expert and not the Court. He presents no persuasive reason why the Court should do this. Accordingly,

O R D E R

IT IS HEREBY ORDERED that the decision of Respondent Wisconsin Personnel Commission is AFFIRMED.

Dated, at Madison, Wisconsin, this 6 day of June, 1996.

BY THE COURT

A handwritten signature in black ink, appearing to read "Jack Aulik", written over the printed name below.

Jack Aulik, Judge
Circuit Court, Branch 4

cc: Attorney Richard Thal
Assistant Attorney General John D. Niemisto