

NILE OSTENSO,
Appellant,

v.

**Secretary, DEPARTMENT OF NATURAL
RESOURCES, and**

**Secretary, DEPARTMENT OF
EMPLOYMENT RELATIONS,¹**
Respondents.

DECISION AND ORDER

Case No. 95-0167-PC

This is an appeal of a reclassification denial. The appellant had requested that this matter be held in abeyance pending court review of a Commission decision (*Ostenson v. DER*, 91-0070-PC, 4/13/94) relating to a previous reallocation of his position. This Commission decision was ultimately upheld by the Wisconsin Court of Appeals (*Ostenson v. Wis. Pers. Comm.*, 96-1777 (Ct. App. 1/29/98)), and the instant matter was heard on June 17 and 22 and July 8, 1999, by Laurie R. McCallum, Chairperson. The parties were permitted to file post-hearing briefs and the schedule for doing so was completed on October 21, 1999.²

1. At all times relevant to this matter, appellant has been employed as a Water Resources Engineer in respondent's Bureau of Water Resources Management.

2. In its decision in *Ostenson v. DER*, 91-0070-PC, 4/13/94, the Commission found that appellant was the department expert in the areas of ZID/MZ, additives, and

¹ The Secretary, Department of Employment Relations, was inadvertently not named as a respondent party in the caption of the Proposed Decision and Order

² In his objections, appellant questions the fact that numbered findings of fact were not included in the Proposed Decision and Order. It should be noted that §227.47(2), Stats., provides that findings of fact and conclusions of law shall not be included in proposed or final decisions of the commission in an appeal of a decision of the secretary of employment relations such as this one

in his liaison activities with the computer modeling staff in relation to ZID/MZ; that these areas of special expertise were not broadly-defined segments of the department's program; that these areas of special expertise had a relatively narrow focus *vis a vis* the department's water pollution program; that appellant's position provided advice to industries, outside consultants, and outside engineers as well as to department staff at the section and bureau levels; that appellant's work did not cross program boundaries; that appellant's work in uncharted areas was limited to his additives area of special expertise; that appellant's involvement with the development of policies, standards, and procedures related primarily to his areas of special expertise; and that appellant did not have responsibility to oversee the program or staff of the unit to which he was assigned.

3. The decision in Case No. 91-0070-PC was based on the position description appellant signed on December 12, 1990.

4. This 1990 position description contained the following goals and time percentages, in relevant part:

- 40% A. Independently establishes effluent limitations for controlling conventional, toxic, and organoleptic substances for complex, major, and minor surface water dischargers. . . . In addition, the establishment of discharge requirements for Superfund and groundwater remediation sites is an important part of the effluent limit setting process.

- 15% B. Development and coordination of the Bureau's statewide program on the decentralized review of water quality based effluent limitations for waste water treatment additives. [one of the special areas of expertise noted in the Commission's earlier decision]

- 10% C. Functions as the Surface Water Standards and Monitoring Section's technical expert on the policy, technology and procedures for establishing zones of initial dilution (ZID) and mixing zones (MZ) as applied to the determination of water quality based effluent limitations on a statewide basis. [one of the special areas of expertise noted in the Commission's earlier decision]

10% D. Development of procedures for enactment of administrative codes to translate water quality criteria into water quality based effluent limitations.

[There is no goal E. in this position description.]

5% F. Participates in the formal review process for water quality variances requested under s. 147.05, Stats.

5% G. Develops and revises water quality criteria for fish and aquatic life for various stream use classifications.

5% H. Professional development and organizational responsiveness.

5% I. Works with other department staff to achieve water quality management planning objectives.

5% J. Corresponds with professional engineers, technical, municipal and industrial personnel, legislators, state and federal officials, the court and the general public regarding all objectives as the need arises.

5. Appellant filed a request for the reclassification of his position to the Advanced 2 level on June 10, 1994. Appellant drafted a position description and signed it on June 10, 1994, and submitted it as part of the subject reclassification request. This position description primarily represented a reorganization of the duties and responsibilities set forth in appellant's 1990 position description. This 1994 position description did set forth the following new or modified duties and responsibilities:

a. Appellant characterized his role in the unit as serving "as one of the lead engineers for the Surface Water Quality Effluent Limits Program."

b. Appellant removed responsibility for Superfund projects from goal A in the 1990 position description to create a separate goal to which he assigned a time percentage of 15%. The 40% time percentage for goal A remained the same.

c. Appellant appears to have reduced the percentage of time devoted to his special areas of expertise, i.e., ZID, MZ, additives, and liaison to the modeling unit but the exact extent of this reduction is not clear.

6. Appellant's supervisor did not sign the 1994 position description primarily because he did not agree that appellant's position functioned as one of the lead engineers in the unit to which he was assigned.

7. Appellant's position was not assigned to lead the work of other staff in the unit to which he was assigned.

8. Appellant did provide advice and consultation on technical matters to other engineers involved in the projects to which he was assigned, but had no engineering or administrative oversight responsibility for these projects. Appellant's role in these projects was to calculate effluent limits for discharges which represented a single, although important, aspect of these projects.

9. Each of the engineers in the unit to which appellant was assigned, including appellant, was assigned projects of varying complexity. In addition to appellant, other engineers in this unit were assigned to calculate effluent limits for Superfund projects.

10. Superfund projects are pollution remediation projects designated by the federal government as a top national priority.

11. During the time period relevant to this classification review, appellant spent 50% of his time on effluent limit calculations for the following projects:

a. Lemberger Superfund project. Robert Masnado, appellant's first-line supervisor at the time of the subject reclassification request, who had worked as a line staff employee on this project preparing recommendations for toxicity testing and as a supervisor with subordinate staff assigned to the project, testified that this project was similar to other Superfund projects in the level of complexity, and that the uncommon twist relevant here related to the presence of a cold water species for which there was precedent with the James River Ashland project. Thomas Janisch, who performed work relating to contaminated sediments on this project, testified that this project went beyond the usual requirements because of the presence of a fishery, that it required a little bit different site assessment, and that the presence of these additional components did not make this project necessarily more difficult. Gary Edelstein, the project manager of the Lemberger project, testified that, in

terms of overall complexity, this project ranked in the top 10 of the 40 Superfund projects in Wisconsin; that he didn't know if appellant's responsibilities relating to the project would be considered one of the most complex engineering assignments; that the establishment of the effluent limits was a complicating factor in the project, but not one of the primary complicating factors; and that, during the course of the project, Mr. Masnado assisted appellant with certain technical problems he was having in carrying out his assignment. Joseph Ball, who was responsible for making certain decisions relating to the monitoring of the biomass for this project, testified that he had a narrow view of the project, and that, from this view, the project was not relatively complex. Dave Hantz, who had responsibilities relating to the issuance of wastewater permits, testified that he was not comfortable assessing the complexity of the effluent limit calculations for this project but that, overall, he sees approximately two projects a year comparable to the Lemberger project. The record shows that the external contacts appellant had relating to the Lemberger project were unusually extensive, but were comparable in nature and number to external contacts other Water Resources Engineers had on the Exxon Mine and Murphy Oil projects. Appellant testified that he considered this a complex Superfund project.

b. Refuse Hideaway project. Mr. Hantz testified that the presence of an outstanding resource water for this project and Lemberger was a complicating factor because of greater public concern and the establishment of very restrictive discharge limits; that this project had similarities to Lemberger relating to the presence of a fish resource and a long-term monitoring component; and that Bonnie Goodweiler, another Water Resources Engineer in appellant's unit, was also involved in effluent limit calculations for this project. Appellant testified that he considered this a complex Superfund project.

c. St. Croix Fisheries project. Mr. Webb testified that this project also involved an outstanding resource water which adds steps to the process relating to the analysis of background concentrations of substances in the surface water. The record shows that, although the preparation of an Environmental Impact Statement (EIS) has some correlation to the complexity of a project and an EIS was prepared for this project, EIS's were prepared for other projects, such as the Flambeau Mine, to which other Water Resources Engineers were assigned. Appellant testified that he considered this a complex project because it required the utilization of certain rarely-employed pre- and post-monitoring procedures.

12. Although the projects listed in Finding 11. were among the more complex projects from the standpoint of the calculation of effluent limits, they were not the only more complex projects assigned to Water Resource Engineers in appellant's unit.

13. Appellant is the chief technical expert in a narrow specialty area, i.e., MZ/ZID and related liaison to the modeling unit, and additives. Appellant was not the only Water Resources Engineer with experience calculating effluent limits for new discharges into exceptional/outstanding resource waters.

14. Appellant's position does not have responsibility for the drafting of administrative rules or the development of unit policies or procedures.

15. James Schmidt also worked as a Water Resources Engineer in the unit to which appellant was assigned. His position is classified at the Advanced 2 level. Mr. Schmidt's position description indicates that he is assigned the following duties and responsibilities:

- 40% A. Independently establishes effluent limitations for controlling conventional, toxic, and organoleptic substances for complex, major, and minor surface water dischargers. . . .
- 25% B. Serves as the lead engineer for the Surface Water Quality Standards Program.
- 10% C. Independently establishes effluent limitations for controlling chemical substances in discharges from Superfund sites . . .
- 5% D. Independently establishes effluent limitations for controlling chemical substances in discharges from contaminated groundwater remedial actions . . .
- 5% E. Development of procedures for enactment of administrative codes to translate water quality criteria into water quality based effluent limitations.
- 5% F. Participate in the formal review process for water quality variances requested under s. 147.05, Stats.
- 5% G. Develop and revise NR 105 [Wis. Adm. Code] water quality criteria for fish and aquatic life for each of the stream use classifications.

16. Appellant's position is comparable to Mr. Schmidt's in terms of the complexity of its engineering assignments. Mr. Schmidt's position is stronger than appellant's from a classification standpoint in view of its lead work responsibilities, including its responsibilities for developing unit and agency policies and procedures.

17. The Water Resources Engineer classification specification states as follows, in relevant part:

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 resources 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 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 a broader combination than that found at the Water Resources 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 employe with the work being reviewed after the decisions have been made.

Representative Position

Lake Management Engineer - Direct the technical aspects of the department's lake management program and provide guidance to federal agencies; obtain, manage and direct the use of state and federal grants for lake protection and improvements projects; provide engineering direction and consultative services to lake organizations and their engineering consultants, other department and state agency program staff, and federal agencies for lake studies and implementation projects; serve as primary state expert on complex lake water quality and comprehensive management issues.

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 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.

The issue to which the parties agreed is:

Whether respondents' decision denying the appellant's request to reclassify his position from Water Resources Engineer-Advanced 1 to Water Resources Engineer-Advanced 2 was correct.

Section ER 3.01(3), Wis. Adm. Code, requires that a position undergo a logical and gradual change in order to qualify for reclassification. The record does not support that such a change occurred here. Appellant offers the following as the substantive changes in his position since he was classified at the Advanced 1 level in 1990:

- a. Appellant characterized his role in the unit as serving "as one of the lead engineers for the Surface Water Quality Effluent Limits Program."
- b. Appellant removed responsibility for Superfund projects from goal A in the 1990 position description to create a separate goal to which he assigned a time percentage of 15%. The 40% time percentage for goal A remained the same.
- c. Appellant appears to have reduced the percentage of time devoted to his special areas of expertise, i.e., ZID, MZ, additives, and liaison to the modeling unit.

The record shows that appellant has not been assigned lead worker responsibilities in his unit but instead that Mr. Schmidt has been assigned these responsibilities; that appellant was assigned responsibility for calculating effluent limits for Superfund projects in his 1990 position description and that the calculation of effluent limits continues to represent the emphasis of appellant's duties and responsibilities; and that it is not possible to conclude from the record whether the extent of the reduction in appellant's ZID/MZ and additives responsibilities is sufficient to be recognized as a cognizable change for purposes of §ER 3.01(3), Wis. Adm. Code. It is concluded as a result that appellant has failed to show that his position underwent sufficient logical and gradual change to qualify for reclassification.

Even if such change had been shown, appellant has failed to show that his position is a best fit at the Advanced 2 level.

The Advanced 2 specifications require that a position “continually perform the most complex reviews for the assigned area.” The record here shows that the most complex assignments are shared by appellant and others in his unit, including Mr. Schmidt, not assigned exclusively to one employee. It is concluded as a result that appellant’s position does not satisfy this requirement.

These specifications also require that the work be performed “typically in uncharted areas.” The record shows that some of appellant’s work is in uncharted areas but that most of appellant’s work is not. This would not satisfy the requirement of “typical” and would not, therefore, meet this Advanced 2 requirement.

To be classified at the Advanced 2 level, a position “typically provides direction to other engineers assigned to the project.” Respondent has interpreted this language to require lead worker responsibilities in the unit to which the employee is assigned. However, this is not what the specifications say. They specifically refer to projects, not employment units. The record shows that appellant provides some direction to other engineers working on the projects to which he is assigned but that most of his interaction with other engineers on these projects consists of the sharing of expertise, not direction. This would not satisfy the requirement that this be a typical responsibility of appellant’s in relation to the projects to which he is assigned and would not, as a result, satisfy this requirement for classification at the Advanced 2 level.

The Advanced 2 specification states that a position at this level serves as “the chief technical consultant.” Appellant’s areas of special expertise, i.e., ZID/MZ and associated liaison duties with the modeling unit, and additives, have not changed since his classification at the Advanced 1 level in 1990. In fact, the record here shows that the percentage of time devoted to these consulting duties did not increase and may have actually declined between 1990 and 1994. In its earlier decision, the Commission concluded that these duties were not in a sufficiently broad specialty area or performed for a sufficiently significant percentage of time to satisfy the requirements for

classification at the Advanced 2 level. This has not changed. Appellant also argues here that some of the expertise he has developed relating to new discharges into outstanding/exceptional resource waters qualifies as an area of special expertise. However, the record shows that appellant is not the only Water Resources Engineer acquiring this expertise in the DNR and, therefore, his work in this area would not qualify him as “the” chief technical expert.

Appellant also argues that the duties and responsibilities of his position compare favorably with those of Mr. Schmidt’s Advanced 2 position. Although the record shows that appellant’s project engineering responsibilities are comparable to Mr. Schmidt’s, Mr. Schmidt’s position is stronger from a classification standpoint in view of his lead worker responsibilities, his responsibilities for developing agency and unit policies and procedures, and his responsibility for participating in the development of administrative rules. It is concluded, as a result, that appellant’s and Mr. Schmidt’s positions are not comparable for classification purposes. Although the parties offer argument relating to whether a majority of Mr. Schmidt’s time is spent performing Advanced 2 level duties, it is not our purpose here to review the appropriateness of Mr. Schmidt’s classification.

It should also be noted that appellant’s argument appeared to urge a re-examination of the Commission’s earlier decision. However, by operation of the principle of claim preclusion, this would not be appropriate here.

ORDER

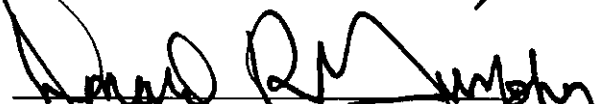
The action of respondents is affirmed and this appeal is dismissed.

Dated: December 15, 1999

STATE PERSONNEL COMMISSION

LRM. 950167Adec1


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DONALD R. MURPHY, Commissioner


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NOTICE

OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

Petition for Rehearing. Any person aggrieved by a final order (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the

Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.) 2/3/95