

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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**ELIZABETH KOHL**, Appellant,

vs.

**Director, OFFICE OF STATE EMPLOYMENT RELATIONS**

and

**Secretary, DEPARTMENT OF AGRICULTURE, TRADE AND CONSUMER  
PROTECTION, Respondents**

Case 608

No. 62902

PA(der)-68

(formerly Case No. 02-0013-PC)

**Decision No. 30996**

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**Appearances:**

**Nicholas E. Fairweather**, Cullen, Weston, Pines & Bach, LLP, Attorney at Law, 122 West Washington Avenue, Suite 900, Madison, WI 53703, appearing on behalf of the Appellant.

**David J. Vergeront**, Chief Legal Counsel, P.O. Box 7855, Madison, WI 53707-7855, appearing on behalf of the Department of Employment Relations (now Office of State Employment Relations).

**Teel D. Haas**, Assistant Legal Counsel, P.O. Box 8911, Madison, WI 53708-8911, appearing on behalf of the Department of Agriculture, Trade and Consumer Protection.

**INTERIM DECISION AND ORDER**

This matter arises from the action taken to reassign the Appellant, Elizabeth Kohl, to a new collection of duties effective February 24, 2002. Appellant filed an appeal with the Personnel Commission (PC) on March 7, 2002. The PC identified both the Department of Agriculture Trade and Consumer Protection (DATCP) and the Department of Employment Relations (DER) as appropriate Respondents in the case. During a pre-hearing conference held on September 18, 2002, the parties agreed to bifurcate the proceeding so that the initial hearing would be limited to the following issue:

Dec. No. 30996

Whether the position to which appellant was reassigned [on February 24, 2002] was properly classified as an Administrative Manager? If not, what is the proper classification?

The parties agreed that depending on the resolution of this initial topic, it might be necessary to schedule a second hearing relating to the remaining issues raised by the appeal. The initial hearing was convened on December 18, 2002, before Personnel Commissioner Kelli S. Thompson. The hearing record includes evidence relating to the following classifications:

- Administrative Manager
- Policy Initiatives Advisor
- Research Manager
- Budget and Policy Analyst – Division
- Budget and Policy Supervisor Division
- Planning and Analysis Manager
- Program and Planning Analyst
- Program and Planning Analyst –Confidential/Supervisor
- Program and Planning Analyst – Advanced Confidential
- Program and Planning Analyst – Advanced Management
- Program and Planning Analyst – Advanced Supervisor

After the hearing was conducted but before a decision was issued, the PC was abolished pursuant to 2003 Wis. Act 33 and the authority for processing this matter was transferred to the Wisconsin Employment Relations Commission (WERC) effective July 26, 2003. The same legislation reorganized the executive branch so that the former Secretary of the Department of Employment Relations is now the Director of the Office of State Employment Relations in the Department of Administration. The WERC Commissioners issuing this decision have read the hearing transcript and have reviewed the remainder of the record.

For the reasons set forth below, the Commission rejects the Respondents' decision classifying the position at the Administrative Manager level rather than the Program and Planning Analyst – Advanced Management level.

At all relevant times, Appellant Elizabeth Kohl has been employed by Respondent DATCP in a Career Executive position. The Career Executive program “emphasizes excellence in administrative skills in order to provide agencies with a pool of highly qualified executive candidates, to provide outstanding administrative employees a broad opportunity for career advancement and to provide for the mobility of such employees among the agencies and units of state government for the most advantageous use of their managerial and administrative

skills.” In order for a position to be included in the Career Executive program, it must be in a classification assigned to pay range 81-01 or 81-02 or, under those circumstances specified in Sec. ER 30.02, WIS. ADM. CODE, be in a classification assigned to a comparable pay range.

Immediately prior to the reassignment that is the subject of this appeal, Kohl had served 2 years as the Deputy Administrator in DATCP’s Food Safety Division. Before that assignment, she served 2 years as the Director of the Office of Policy and Program Analysis as well as more than 7 years as DATCP’s Deputy Secretary.

Early in 2002, the Secretary of DATCP, James Harsdorf, decided to eliminate Kohl’s Deputy Administrator position in the Division of Food Safety because the administrative and compliance portions of that division and the Division of Animal Health were to be combined for budgetary reasons. Shiela Graham of the Division of Animal Health assumed the administrative responsibilities for the combined Divisions.

The Secretary met with Appellant on or about January 12, 2002, and proposed reassigning her to a new position as “Senior Policy Advisor on Environmental Policy.” As the Secretary described the position in these initial discussions, it was to report directly to the Secretary and would have responsibility to promote an agency environmental agenda that would require a high level of coordination with the Department of Natural Resources, the University of Wisconsin and the United States Department of Agriculture. Secretary Harsdorf presented Appellant with a copy of a position description (PD) for the new position. The PD indicated the position would be classified at the Administrative Manager class level and would not serve as a supervisor. The PD included the following language:

Position Summary: This position is an integral member of the Department’s senior management team, located in the division of agricultural resource management. This position plays an active and significant leadership role in formulating, determining and implementing policy and programmatic decisions that substantially affect important state and local agricultural and natural resource management programs and policies. In addition, this position is responsible for overseeing the development and implementation of specialized budget plans and funding allocations. The resulting decisions and actions affect policies and business operations in the division of agricultural resource management as well as directly affect related programs at the county level.

The position works with a variety of program managers and leaders at the local, state and federal level, business and industry representatives and with a diversity of interest groups and organizations. The work entails planning, management, implementation and evaluation of highly complex and involved programs such as the Conservation Reserve Enhancement Program, the Wisconsin Agricultural Stewardship Initiative [WASI], and the Soil and Water Resources Management Program [SWRM].

This position reports directly to the Division Administrator. This position has wide discretion in matters that significantly affect the Division's policies and programs.

Goals . . .

- 40% **Goal A:** Participation in management policy formulation, determination and implementation, including advice and assistance to the administrator related to major agricultural and natural resource policy issues central to the division's and department's mission.
- 25% **Goal B:** Provision of program planning and analysis, advice, and assistance to the administrator on existing, new and emerging programs and service delivery systems. These include complex, highly visible programs that have substantial impact on agency and state resources and involve the coordination of resources both internal and external to the division and agency.
- 20% **Goal C:** Development and implementation of specialized program budgets, fiscal plans or fund allocations (e.g., annual allocation plan for counties).
- 15% **Goal D:** Management and performance of internal and interagency liaison activities relating to division agricultural and natural resource policies and programs.

The initial PD also identified Nicholas Neher, Administrator of the Division of Agricultural Resource Management, as the first-line supervisor for the position. With the single exception noted below, this PD later became the official PD for the Appellant's new position.

Within a few days of her initial meeting with Secretary Harsdorf, Appellant met with him again and expressed concern whether the position would be properly described at the Administrative Manager classification level. Sometime after the Appellant met with Secretary Harsdorf, DATCP added the word "administration" as the third to the last word in the last sentence of the "Position Summary."

DATCP intended for the position to be classified in the Career Executive program. By January 30, 2002, DER had reviewed the PD and concurred that the position was best described in the Administrative Manager classification which is assigned to pay range 81-01 and is in the Career Executive program.

Mr. Neher and DATCP's personnel manager signed the PD on February 7, 2002. Secretary Harsdorf wrote Kohl on the same date confirming her Career Executive reassignment to the new position, effective February 24<sup>th</sup>. Kohl began working in the position on February 24, 2002. She signed the PD on March 14<sup>th</sup>.

Upon assuming her new position, Appellant met with her supervisor, ARM Administrator Nicholas Neher. At this meeting, Appellant was provided with a document entitled "Key Issues and Projects Assigned to Elizabeth" that read:

1. Work with Ned [Zuelsdorff, Director of the Bureau of Agrichemical Management] on WASI.

*Assignment:* Prepare necessary documents to enable WASI to become a 501 3C [sic] organization.

2. Work with Bureau Directors to seek and obtain outside funding.

*Assignment:* Meet with Bureau Directors and Division Administrator to generate ideas and opportunities.

Develop and implement strategy to secure funding.

3. Work with Dave Jelinski [Director of the Bureau of Land & Water Resources] and Division Administrator to review and modify as necessary the current SWRM allocation process. This would include recommendations on staff utilization and technical needs.

4. Work with Management Team to prepare for the next biennial budget.

*Assignment:* Once key initiatives are decided, prepare necessary materials.

5. Work with Dave Jelinski and Bureau management to establish long-term visions for the Farmland Preservation program.

*Assignment:* Develop position paper which provides background, assesses strengths and weaknesses, provides options on how to achieve goal.

6. Participate in program evaluations.

*Assignment:* Work with Division Administrator to establish a team to provide critical review of a few key programs (inspection and sampling).

7. Provide supporting documentation for complex rules.

*Assignment:* Currently no complex rules are in development.

8. Track key environmental issues and recommend policy positions.  
*Assignment:* Meet with Bureau Directors and identify issues and potential policy concerns.

Appellant does not supervise other employees, have the authority to allocate financial resources or have responsibility for managing a particular DATCP program in her new position.

The Administrative Manager specification provides the following:

Inclusions: This classification encompasses a supervisory and management position for a state agency which directs a major and significant administrative program at the division or bureau level. Full line deputies would also be included in this classification. Administrative or management services division administrator positions would be responsible for the administrative support functions of an agency and would include the majority of the following programs: fiscal, budget, purchasing, human resources and information systems. Programmatic division administrators or bureau director positions would be responsible for a major and significant program and would include, as a minimum, (1) direction of programs through subordinate supervisors which include 100 or more positions predominately non-professional in nature; (2) direction of programs through subordinate professional supervisors which include 30 or more positions predominately professional in nature; or (3) direction of a program with state-wide impact which includes 10 or more professional positions at least three of which have an objective level of pay range of 16 or above.

Exclusions: Excluded from this classification are the following types of positions:

1. Positions which do not meet the statutory definition of supervisor and management as defined in Wis. Stats. 111.81(19) and (13).
2. Positions which do not function as a division administrator or bureau director or organizational equivalent; or a full line deputy to a division administrator or bureau director. . . .
5. All other positions which are more appropriately identified by other classification specifications.

Definition: Administrative Manager: Functions as the Division Administrator for an agency's administrative services division or a programmatic Bureau Director for a major and significant program as defined in the inclusion

statement in Section I of these classification specifications. Under executive or policy level direction, formulates, determines and implements management policy relating to the program directed and participates in policy development as part of the executive or management team. Develops strategic plans and budgets necessary to meet agency mission requirements relating to the programs managed. Represents the agency at internal executive or managerial level meetings and represents the agency with the public regarding their programs which require public acceptance and cooperation. Reviews and evaluates proposed legislation or administrative code changes relating to programs managed. Decisions made by an employee in this classification have a fundamental impact on the programs, organization and operation of the agency.

There are approximately 10 positions in State service that are classified at the Administrative Manager level but have no supervisory responsibility.

Appellant's position has no supervisory responsibility, does not function as a division administrator, bureau director or the organizational equivalent and does not function as a full-line deputy to a division administrator or bureau director.

The definition for the Policy Initiatives Advisor classification requires a position allocated to that classification to perform "highly responsible and difficult management work in a major agency" and defines a major agency as an agency that includes at least 1000 FTE positions. DATCP has fewer than 1000 FTE positions so it does not qualify as a "major agency" for purposes of the Policy Initiatives Advisor classification.

The Budget and Policy Supervisor Division classification series requires positions allocated to the series to meet the statutory definition of "confidential" employee. However, Appellant is not a "confidential" employee.

The Planning and Analysis Manager classification specifically excludes positions that do not meet the statutory definitions of both supervisor and management.

The Research Manager classification only includes positions that meet the statutory definitions of both supervisor and management.

The Program and Planning Analyst – Advanced Confidential specification provides that any position allocated to that classification must meet the statutory definition of confidential.

The Program and Planning Analyst – Advanced Supervisor specification provides that any position allocated to that classification must meet the statutory definition of supervisor.

The classification specification for the Program and Planning Analyst series provide, in part:

B. Inclusions

These series are intended to allow classification of a wide range of positions specializing in policy analysis, program planning, facility planning, land use or regional planning, program evaluation, or comparable or combined functions. The work is performed as a staff service to line management, to assist them in defining program goals, developing and planning programs or facilities to achieve them, developing policies and procedures to guide these programs, and analyzing the current or projected effectiveness of programs in achieving goals. Positions in these series analyze problems, issues, or proposals, develop alternatives, options, or plans, and recommend courses of action based on the results of analysis. The work is professional in nature (as defined in s. 111.81 (11), Stats.) but such positions do not, typically, function as specialists in a particular discipline (e.g., economics engineering). Rather, they involve applying particular concepts, approaches, and techniques from a variety of disciplines or specializations along with a high degree of analytic skill and substantive knowledge of the program area. The specific series are defined below:

1. The Program and Planning Analyst series encompasses positions having the primary purpose of performing policy analysis, facilities planning, land use or regional planning, program planning, program evaluation, or a combination of these functions. The position must involve analysis of information, issues, problems, or proposals in order to develop alternatives or compare their impacts, develop plans or policies, and recommend appropriate course of action based on the results of analysis, typically to others with responsibility for carrying them out. . . .

C. Exclusions: Excluded from classes described in this position standard are;

1. Positions which do not meet the criteria set forth in s. 111.81 (11), for identification as professional;
2. positions in which planning, evaluation, and analysis functions are subsidiary to carrying out other responsibilities such as provision of direct services to clients or patients, the administration of grant programs, or the administration of a program of direct or administrative services;



3. positions primarily responsible for examining programs or decisions for compliance of operations or conclusions with established laws, regulations, or standards;
4. positions with the primary purpose of performing specialized analytic functions such as budget and management analysis, research, statistical analysis, computer programming and systems analysis, office systems analysis, or fiscal analysis, which are identified in more specific classification series;

...

F. Classification Factors Individual position allocations in this series will be based on the following five factors:

Factor 1 – Scope and Impact of Work;

- a. Scope (range or extent) of the goals and accomplishments; and
- b. Impact of the work both internal and external to the work unit.

Factor 2 – Complexity of Work;

- a. Nature of the work;
- b. Difficulty in deciding what needs to be done; and
- c. Difficulty in performing the work.

Factor 3 – Knowledge and Skills Required:

- a. Breadth (variety) and depth (degree of detailed understanding) of knowledge required and used in doing acceptable work; and
- b. Breadth and depth of skill needed to apply knowledge.

Factor 4 – Personal Contacts and Their Purpose:

- a. Nature of contact (who with and how received);
- b. Frequency of the contact (how often and for what duration); and
- c. Purpose of the contract.

Factor 5 – Discretion and Accountability:

- a. Extent to which the work is structured or defined;
- b. Nature and extent of the work review; and
- c. Extent to which one is responsible to other authority for actions taken or decisions made.

The Program and Planning Analyst specifications proceed to lay out an extensive grid of definitions to be used for assigning point values to different levels of each of the “classification factors” listed above. This process is described in the specifications as follows:

#### IV. Factor Evaluation Guide

The Factor Level Definitions below provide the basis for evaluating all administrative, supervisor, lead, and staff positions (above the entry or advanced entry/developmental level) covered by this position standard. To use this Evaluation Guide, analyze the position to be evaluated on the basis of the five classification factors defined in Section I. F. Then proceed factor by factor to determine which level of the factor (as defined by the Factor Level Definitions) best describes that aspect of the position. Note that the Factor Level Definitions are intended to represent progressively greater degrees of scope, complexity, etc. Thus, to be properly evaluated at any particular level, a position should exceed the previous levels (if any) of the factor. Add the point values associated with each level or combination of levels together and compare this total to the Point/Pay Range conversion table in Section IV.B. to determine the pay range for the position.

The Program and Planning Analyst specifications assign the Program and Planning Analyst 5 class level to point range 410 to 500, the Program and Planning Analyst 6 level to point range 505 to 605, and the Program and Planning Analyst 7 level to point range 610 to 710.

The definition portion of the Program and Planning Analyst – Advanced Management specification provides:

Positions in this classification perform policy analysis, facilities planning, land use or regional planning, program planning, program evaluation, or a combination of these functions, as defined in the Program and Planning Analyst classification specification. Positions allocated to this classification are point rated at 410 to 720 points using the Factor Evaluation System contained within the Factor Evaluation Guide section of the Program and Planning Analyst classification specification.

Positions allocated to this classification meet the statutory definition of management as defined in Wis. Stats. 111.81(13).

The Commission concludes that at the time it was initially allocated, Appellant's position was better described at the PPA Advanced Management class level than the Administrative Manager class level.

**ORDER**

Respondents' decision allocating the Appellant's position to the Administrative Manager classification rather than the Program and Planning Analyst – Advanced Management classification is rejected. The Commission will contact the parties for the purpose of conducting a status conference and, if necessary, to schedule further proceedings.

Given under our hands and seal at the City of Madison, Wisconsin, this 23rd day of July, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Paul Gordon /s/

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Paul Gordon, Commissioner

Susan J. M. Bauman /s/

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Susan J. M. Bauman, Commissioner

Chairperson Judith Neumann did not participate.

**Department of Employment Relations and Department of Agriculture, Trade and Consumer Protection (Kohl)**

**MEMORANDUM ACCOMPANYING INTERIM DECISION AND ORDER**

The Appellant has the burden of proof in this matter. She must establish by a preponderance of the evidence that the decision to classify the position she filled commencing on February 24, 2002, was incorrect and that her position was correctly or properly classified at a requested level. MEYER-GROVER ET AL. V. DER, 94-1011-PC, ETC., 1/23/96. Respondent DATCP argues that the Appellant failed to identify “the alternative classification she believes is the correct classification for her position, let alone present any evidence to prove the alternative classification is appropriate.” (Brief, p. 11, emphasis added.) While it is true that Appellant has the burden of proof to establish that another classification better describes the position, she may propose multiple alternatives. Respondents’ decision to allocate the position in question to the Administrative Manager classification amounted to a decision that the position was described better by the Administrative Manager specification than by any of the other approximately 1900 classifications in the State’s classification system. If the Appellant is able to show that any one of these other classifications better describes the duties assigned to her position, then she has sustained her burden.

This conclusion is consistent with the stipulated issue in this matter. While the issue could have been phrased in a way that limited the Commission’s review to the Administrative Manager class and one or two alternatives, the parties agreed to a much more general statement of issue that permitted the Appellant to offer evidence relating to any classification in existence at the time of the decision being reviewed. The hearing record includes numerous classification specifications, all of which have been summarized, in pertinent part, above. These classifications represent the universe of alternatives available for consideration by the Commission in this matter.

***Relevant duties/responsibilities***

This appeal was precipitated by a change in the organizational structure of Respondent DATCP. Once the agency decided to combine two divisions and to assign the administrative responsibilities for the new division to Sheila Graham rather than to the Appellant, Secretary Harsdorf chose to assign substantially new responsibilities to the Appellant. A preliminary question raised by this appeal relates to the duties that should serve as the basis for the Commission’s decision.

This case is unusual in that the decision being reviewed relies on an assessment of job duties that, by definition, must occur before someone has begun to actually carry out the position's responsibilities. In the vast majority of classification cases, the Commission is able to examine the duties actually performed by the subject position in question over a period of several months, if not years. In a reclassification appeal, the focus is on the permanently assigned duties performed over the 6-month period immediately preceding the effective date of the reclassification decision. 1/ Often the duties performed during this period are consistent with those responsibilities assigned to the position during the months immediately before and after that period. In an appeal from a decision to reallocate a position as part of a classification survey, the Commission focuses on the duties actually assigned as of the effective date of the survey, which is typically also the effective date of a new set of classification specifications. Once again, in the typical reallocation case, it may be appropriate to consider the duties being performed by the incumbent in the months before and after the effective date in order to get an accurate snapshot of the duties that were assigned as of the effective date. In *NELSON V. DER*, 92-0310-PC, 9/17/96, the Personnel Commission described the time period to be examined when reviewing a reallocation decision that was made as part of a classification survey:

Appellant's position was reallocated pursuant to the implementation of a personnel management survey of the classifications of certain financial positions by respondent DER. When a position is surveyed for classification purposes, its duties and responsibilities are evaluated during a discrete and limited period of time immediately prior to the effective date of the survey, i.e., a "snapshot" of the position is taken during this period of time. As a result, only the duties and responsibilities actually assigned to the position during this period of time will determine its classification.

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*1/ In order for an employee to be "regraded" so as to follow the change in classification of the position that is the subject of a reclassification case, the employee must have been performing the duties that justify the new classification for a minimum of 6 months prior to the effective date of the decision. Sec. ER 3.015(3)(b), WIS. ADM. CODE.*

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This topic was considered further in a subsequent decision involving the review of another reallocation decision arising from a classification survey. In *MUELLER V. DOT & DER*, 93-0109-PC, 2/27/97, the employee worked as a member of a pool of engineering technicians who were assigned to individual highway construction projects. The projects varied in complexity and the relevant classification specifications were differentiated, in part,

by the complexity and cost of the projects assigned. The specifications became effective on June 17, 1990. The PC wrote:

Part of the difficulty of this case is due to the length of the work assignments that are made to construction pool employees. One hypothetical example is a project manager who completed a 2 year, \$4 million project with 200 contract items on May 1, 1990, and then, while waiting for a similar project which began on August 1<sup>st</sup>, worked as project manager on a \$250,000 bridge project that lasted only three months. The Commission has previously held that the duties and responsibilities actually assigned to a position during a “discrete and limited period of time immediately prior to the effective date” of a personnel management survey will determine the position’s classification. NELSON V. DER, 92-0310-PC, 9/17/96. However, it is clear that the hypothetical employee would be properly classified based upon her \$4 million projects rather than based upon the \$250,000 project that occupied the employee on June 17, 1990, when the classification survey was effective. This result reflects the fact that individual projects could last for many months and the fact that the mix of projects and employees at any given time might preclude assigning an employee to a project of similar complexity to those projects normally assigned the employee.

In the present case, the decision that is being reviewed is the decision to initially allocate a position, before it has been filled and before any duties have actually been performed. The focus here has to be on the duties that the employing agency contemplated assigning to the position as of the classification decision in question. Whether or not Secretary Harsdorf had, prior to January 12, 2002, envisioned the position as reporting directly to the Secretary, this was clearly not the operative vision for the position as of the time DER reviewed it for classification purposes. By the time DER conducted its review, the position in question was to report to the Division Administrator of ARM, Nicholas Neher, as reflected in the position description.

The best indications of the relevant duties in this matter are the PD and, to a somewhat lesser extent, the document entitled “Key Issues and Projects Assigned to Elizabeth” that was prepared by Mr. Neher and given to the Appellant at the time she assumed the position. Appellant provided evidence at hearing that she did not actually perform some of the responsibilities referenced on these documents during the 10 months between February 24<sup>th</sup> and the date of hearing. However, it is not reasonable to expect that the incumbent in a new position will immediately be engaged in the entire range of responsibilities that the employing agency might have originally expected to assign to that position. This is especially true for a

high-level position such as the one at issue here. Unless the Appellant was able to show that by February 24<sup>th</sup> DATCP did not *expect* her to ever perform one or more of the duties reflected on the PD, the fact that she had not performed the function in the 10-month period after the position was filled is not relevant to a review of the initial allocation decision. Appellant did not present evidence to support a conclusion that DATCP intended the PD to be a sham that would mislead DER into allocating the position to a classification in the Career Executive pay ranges of 81-01 or 81-02.

The Commission's interpretation of the relevant duties that are to be considered in this matter is consistent with the PC's decision in *VOGEN v. DER*, 92-0601-PC, 6/23/94. The employee in that matter argued that a particular position elsewhere in the employing agency should not be used for comparison purposes because the position incumbent was not performing some of the duties specified in the PD. The PC held that the position was, nevertheless, an appropriate comparison:

[I]t should be noted here that this position [filled by Anne Mael] was a newly created and vacant position when it was first classified at the Advanced level, and that the Advanced classification was based on the duties and responsibilities set forth in a position description which was obviously prepared and approved prior to recruitment. Consequently, the duties and responsibilities actually performed by the successful candidate for this position could not have affected the classification decision [that] is cited here for comparison purposes and would not be relevant to this discussion.

In *VOGEN* and in the present matter, the determinant duties for classifying the positions are those reflected in the position descriptions used for initially allocating the positions rather than the work the incumbents may have performed (or not performed) months or years later. 2/

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*2/ Even if the Commission had concluded that the work actually performed by Appellant during the 10 months after February 24<sup>th</sup> should be considered when reviewing the proper allocation of the position in question, Appellant's testimony that her work during this period was mere "wordsmithing" is not accurate. Appellant had an incentive to understate, rather than overstate, the nature of her work in the new position. For example, she testified that Appellant's Exhibit 4-O was merely "digesting" and "summarizing" information from other agencies regarding an environmental initiative called "Green Tier" that was being proposed by the Department of Natural Resources. Despite Appellant's characterization, the document is more than a summary. It poses a series of questions about the Green Tier initiative, explains why it is inconsistent with DATCP's environmental regulatory structure for Wisconsin farms and explains why it is inconsistent with DATCP's own legislative agenda. Appellant's testimony that she was merely engaged in "wordsmithing" is also inconsistent with the statements of Respondents' witnesses.*

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***Defined terms: supervisor, confidential, management***

Various classifications at issue provide that the position in question must meet the definitions of “supervisor,” “confidential” and/or “management.” The classifications adopt the definitions of these terms found in the Subch. V of Ch. 111, Stats., the State Employment Labor Relations Act (SELRA).

The parties agree that the position filled by the Appellant on February 24, 2002, does not satisfy the definition of “supervisor” found in Sec. 111.81(19), Stats., which provides:

“Supervisor” means any individual whose principal work is different from that of the individual’s subordinates and who has authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline employees, or to adjust their grievances, or to authoritatively recommend such action, if the individual’s exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The consequence of the lack of supervisory responsibilities on the proper classification of this position is discussed elsewhere in this decision.

Both the Budget and Policy Supervisor Division classification and the Program and Planning Analyst – Advanced Confidential specification include the requirement that the position satisfy the “statutory definition” of “confidential” in Sec. 111.81(7), Stats., “as administered and interpreted by the Wisconsin Employment Relations Commission.” Sec. 111.81(7), Stats., provides, in relevant part:

“Employee” includes:

(a) Any state employee in the classified service of the state . . . except . . . supervisors, management employees and individuals who are privy to confidential matters affecting the employer - employee relationship . . . .

The Commission has interpreted this reference to “confidential” to mean that the employee must have access to, knowledge of, or participate in confidential matters relating to labor relations, i.e. the information must deal with the employer’s strategy or position in collective bargaining, contract administration, litigation or other similar matters relating to labor relations between the bargaining representative and the employer, and must not be available to the bargaining representative or agent. WISCONSIN STATE ATTORNEYS ASSOCIATION, DEC. NO. 11640-E, (WERC, 7/97).



There is nothing in the record to suggest that the position in question is privy to confidential matters affecting the relationship between the employer and one or more bargaining representatives. None of the duties described in either the PD or Mr. Neher's "Key Issues and Projects" document reference labor relations. As a consequence, the Commission finds that the individual filling the position in question does not qualify as a "confidential" employee.

The third definitional requirement set forth in several of the classifications at issue is that the position satisfy the description of "management" set forth in Sec. 111.81(13), Stats., which provides:

"Management" includes those personnel engaged predominately in executive and managerial functions, including such officials as division administrators, bureau directors, institutional heads and employees exercising similar functions and responsibilities as determined by the commission.

Appellant is not a division administrator, bureau director or institutional head, so the remaining question is whether she exercises "similar functions and responsibilities as determined by the commission." In STATE OF WISCONSIN, DECISION NO. 11640-C (WERC, 1/86), the Commission provided further explanation of the analysis it applies when it construes the term "management":

This definition specifically lists certain positions [that], by virtue of their placement in the organization structure, are per se management positions. This listing however is not all-inclusive. In previous cases, the Commission has given further meaning to the term "managerial" as that word appears in both SELRA and [the Municipal Employment Relations Act]. Those cases have held that "managerial" functions must be demonstrated by a showing that the occupant of the position in question participates in a significant manner in the formulation, determination and implementation of management policy or that the occupant of such a position has the effective authority to commit the municipal employer's resources.

Managerial functions are not "predominant" unless they take more time than all other duties. STATE OF WISCONSIN, AT P. 89. The PC quoted, with approval, substantially similar language in PAMPERIN V. DER, 90-0321-PC, 7/25/94.

The second of the options for satisfying the “management” requirement arises from having the authority to commit the employer’s resources. Mr. Neher testified (T 153) that the position in question is not accountable for spending within the Division. Respondents have not argued that the position fulfills this option and the Commission is unaware of any evidence in the record to support a different conclusion.

The other option for falling within the “management” definition is based on formulating, determining and implementing management policy. The PD that served as the basis for the reallocation decision is replete with language supporting a “management” designation for this position. The position reports directly to the ARM Division Administrator, which is a reporting relationship identical to that of bureau directors, and is identified as “an integral member of the Department’s senior management team.” It plays an “active and significant leadership role in formulating, determining and implementing policy.” “The work entails planning, management, implementation and evaluation of highly complex and involved programs” and the position has “wide discretion in matters that significantly affect the Division’s policies, administration and programs.” Goals A, B and D, representing 80% of the overall responsibilities, all fall within the scope of “management” and satisfy the “predominant” requirement. The language of Mr. Neher’s “Key Issues and Projects” document also supports the conclusion that, as of the time of the original allocation decision, the position’s duties were “predominately executive and managerial” as required by Sec. 111.81(13), Stats. These assignments included the responsibility to work with other members of management to “develop and implement strategy to secure funding,” “review and modify as necessary the current SWRM allocation process,” “prepare for the next biennial budget,” “establish long-term visions,” “establish a team” to critically review key programs and, finally, to “identify issues and potential policy concerns.” Mr. Neher testified that if these responsibilities had not been assigned to Appellant’s position, they would typically have gone to one of the Bureau Directors.

It is undisputed that the position has not been assigned the responsibility to manage one or more specific DATCP programs. However, the Appellant has failed to establish that the lack of overall management responsibility for specific programs precludes a position from satisfying the “management” definition. 3/

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*3/ The record includes position descriptions of other positions in the State civil service that have been assigned to the Administrative Manager classification which, in turn, specifies that such positions must satisfy the statutory definition of “management.” As explained elsewhere in this decision, the Commission finds that these positions do not satisfy the “supervisor” requirement that is also a part of the Administrative Manager classification. Nevertheless, these positions may be viewed as comparables for the purpose of interpreting the “management” requirement. The position filled by Morna Foy at the Wisconsin Technical College System Board (WTCSB) (Resp. Exh. 211 and referenced on page 6 of Resp. Exh. 200) has a position summary that includes the following language which closely tracks the responsibilities assigned to the Appellant’s position:*

*As part of the technical college system management and policy team . . . functions under general guidance of the [Director of the Bureau of Policy and Government Relations] . . . conducting highly complex policy studies which examine existing system fiscal and program policies . . . to produce recommendations to the WTCS State Director, State Board, District Boards, and the Legislature . . . Coordinates legislative policy studies . . . and participates as a member of the system budget and analysis team.*

*Nothing in the description of the Foy position indicates that it has responsibility for one or more WTCSB programs. This comparison provides additional support for the conclusion that the Appellant's position meets the "management" definition.*

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The Commission concludes that the Appellant's position satisfies the definition of "management" but fails to meet the definition of "supervisor" or "confidential."

Even though the Administrative Manager classification specifically excludes positions that "do not meet the statutory definition of supervisor and management as defined in Wis. Stats. 111.81(19) and (13)," Respondents contend that the Appellant's position, with no supervisory responsibility, is properly classified at the Administrative Manager level. This contention is premised on the fact that there are approximately 10 other positions that do not serve as a supervisor but are classified at the same level and on testimony that due to reductions in classification staff and the press of other business, DER has not taken the steps to change the Administrative Manager classification specifications to reflect that supervisory responsibility is not required.

Respondents' argument that the Commission should simply ignore the supervisory requirement in the Administrative Manager classification is contrary to a long and consistent series of decisions that the agency exercising the authority to conduct quasi-judicial reviews of classification decisions can not simply disregard or rewrite the classification specifications promulgated by DER. *ZHE ET AL. V. DHSS & DP*, 80-0285-PC, 11/19/81; *AFFIRMED BY DANE COUNTY CIRCUIT COURT, ZHE ET AL. V. PC*, 81-CV-6492, 11/2/82 (even though the specifications were outdated and created salary inequities, the Commission was bound by them and could not rewrite them); *ASLAKSON ET AL. V. DER*, 91-0135-PC, ETC., 10/22/96 (the basic authority for classifying positions is the classification specifications as they are written and approved by DER and actions taken by DER which are inconsistent with the classification specifications are not binding on the Commission); *DOEMEL V. DER*, 94-0146-PC, 5/18/95, (the specifications prevail over equitable considerations); *MERTENS V. DER*, 90-0237-PC, 8/8/91, (the PC rejected the argument that if one word in the specifications would be ignored, the appellant's position would fit at a the higher level). In *VRANES V. DER*, 83-0122-PC, 7/19/84, the Research Analyst classification specifically excluded positions that did "not meet

the criteria set forth in §111.81(11) for identification as professional” and the parties disputed whether the appellant performed professional work. After concluding that the appellant’s responsibilities failed to satisfy the statutory criteria, the PC held that “since the position standard for Research Analyst requires that positions must be professional, as defined by the statute, to be included in that series, the appellant cannot be a Research Analyst.” In its recent decision in DER(CHIPPETTA), DEC. NO. 30760 (1/04), the Commission refused to consider a comparison position that was incorrectly classified:

Appellant points to the Zielesch position as an FS5 [position] that has responsibilities similar to hers. There was clear testimony from the author of the class specifications that this position was not properly classified at the FS5 level and had been placed there as a result 1) of an administrative support survey that eliminated another series and 2) a policy that the survey would not result in a lowering of pay ranges for anyone. The classification was changed after Ms. Zielesch left the position. The fact that Zielesch was misclassified cannot form the basis for further misclassification of personnel.

The Commission rejects the Respondents’ contention that the Commission should ignore the supervision requirement in the Administrative Manager classification. 4/

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*4/ Respondents’ allocation decision was premised on the assumption that the position in question had to remain part of the Career Executive program and, as a consequence, had to be assigned to a classification in either pay range 81-01 or 81-02.*

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Having determined that Appellant’s position does not fall within the language of the Administrative Manager classification because it has no supervisory responsibility, we need not determine whether the position filled by Appellant is barred from this classification for any other reason. However, the Commission notes that the Administrative Manager specifications also require that a position at that level 1) “direct a major and significant administrative program at the division or bureau level” that includes responsibility for the administrative support functions of an agency, 2) serve as a programmatic division administrator or bureau director responsible for “a major and significant program” or 3) “serve as a full line deputy to a division administrator or bureau director.” Appellant’s position does not meet any of these requirements because she is not a full line deputy, does not have responsibility for one or more agency programs and does not have responsibility for DATCP’s administrative support functions.

### *Remaining alternative classifications*

The only classifications at issue that include positions falling within the statutory definition of “management” but do not also require the position to satisfy the definitions of “confidential” or “supervisor” are Policy Initiatives Advisor, Program and Planning Analyst and Program and Planning Analyst – Advanced Management.

The Policy Initiatives Advisor classification includes the following language:

To be included in this classification, the position must be specifically created and authorized by the Department Secretary . . . report to the Secretary or Deputy Secretary (although may be functionally attached to a division) and be given substantial authority to act on behalf of the Secretary in the formulation, determination and implementation of significant policy initiatives. . . .

## II. DEFINITIONS

This is highly responsible and difficult management work in a major agency 1/. . . . Work is performed under the general policy direction of the Department Secretary or Deputy Secretary. In some cases, the position may be located within a division and work under the functional direction of one or more division administrators although work accountability will remain with the Department Secretary or Deputy Secretary.

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1/ Major agency includes 1,000+ FTE permanent and seasonal positions, excluding limited-term employment employees.

The record does not support the conclusion that the Appellant’s position is accountable to either the Secretary or Deputy Secretary. In addition, DATCP fails to employ sufficient full-time equivalent positions to satisfy the definition of a “major” agency.

The Program and Planning Analyst (PPA) series and the PPA – Advanced Management classification are closely related. The language in the “Inclusions” of the PPA series indicates it covers “a wide range of positions” and generally describes the duties to include policy analysis, program planning, program evaluation “or comparable or combined functions.” More specifically:

The position must involve analysis of information, issues, problems, or proposals in order to develop alternatives or compare their impacts, develop plans or policies, and recommend appropriate course of action based on the results of analysis. . . .

This is consistent with the responsibilities described in the PD for the Appellant's position and in Mr. Neher's list of "Key Issues and Projects." In addition, none of the exclusions in the PPA series precludes assigning the Appellant's position to one of the class levels included in the series. 5/ Respondents do not argue nor does the record support a conclusion that the Appellant's position is not "professional" as that term is defined by statute. The "planning, evaluation, and analysis functions" are the focus of the position. Those functions are not subsidiary to some other direct service or program administration function. Appellant's position is not primarily responsible for a compliance function, nor for one of the "specialized analytic functions" listed in Exclusion 4.

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*5/ Nevertheless, the PPA 1 level may not be considered because it is defined as an "entry level" position functioning "under close, progressing to limited, supervision." The Appellant's position receives "general" supervision and functions at the full performance level.*

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The PPA – Administrative Manager classification excludes positions that perform certain analytic functions that relate to highly specialized training or knowledge such as education or unemployment compensation. The Appellant's position does not fall within this exclusion. As noted above, this position also satisfies the "management" requirement that applies at this level.

Both the PPA and PPA – Advanced Management classifications incorporate a very complex Factor Evaluation System (FES) that is based on assigning various characteristics of a position into one of a series of definitions that are, in turn, assigned a particular number of points. After all the characteristics have been considered, the points are totaled.

None of the parties in this matter supplied evidence calculated to assist the Commission in its effort to apply the FES structure to Kohl's position. There are no positions of record that are assigned to the PPA series. While the record includes PDs for five positions assigned to the PPA – Advanced Management classification, there is no indication where these positions fit within the 410 to 720 point range for that class. Accordingly, the Commission has calculated the appropriate point totals for the Appellant's position without the benefit of the parties' analysis. In doing so, we have relied on the information contained in the language of the position description as it is amplified by Mr. Neher's list of assignments.

According to the Factor Level Definitions, the first factor is divided into two subfactors, Scope and Impact. Scope measures "the range of functions and the degree of the responsibility for, or the extent of the contribution of the work product to, the effect of the work described in the Impact subfactor definitions." The position is to be rated in terms of

both Scope and Impact based on the primary purpose of the position. As Goal A of the position description, “Participation in management policy formulation, determination and implementation, including advice and assistance to the administrator related to major agricultural and natural resource policy issues central to the division’s and department’s mission,” represents 40% of the position as defined by DATCP, we evaluate the scope and impact against this goal.

Scope level S-3 provides, in part:

The purpose of the work is to formulate and conduct policy analysis, planning, program evaluation, or similar analytic projects, as project leader, frequently with specifically-assigned staff assistants. . . . The analyst is accountable for clarifying the problem to be addressed, designing the study and choosing methodology, collection and analysis of information, development of alternatives, options, or conclusions, and recommendation of the appropriate course of action . . . . Existing plans, policies, or program results provide only broad constraints on, or presuppositions for, the scope of the analysis and content of project results. . . .

This description is consistent with the scope of the analysis referenced in activity A.1 of the PD, which reads:

Independently identify major policy issues and initiatives that the division, department, or Governor should address related to agricultural and natural resource management; conduct analyses and develop appropriate actions for consideration.

The immediately higher level of S-4 incorporates the S-3 level but requires the analyst to have “responsibility for directing the work of several full-time assistants” or to “administer a . . . program . . . typically as a line supervisor.” Appellant’s position does not meet either of these alternative requirements for the S-4 level.

The standard for level I-3 of the Impact subfactor includes positions responsible for:

the development of plans or policies which control the provision of services to a client group or industry; the development of plans or standards for the protection of the state’s air or water quality; evaluation or similar studies which provide the basis for major modifications of programs or policies controlling the scope and intensity of services to a large client group . . . .

The I-4 level refers to positions responsible for “effective recommendations of policy positions on major issues such as . . . toxic waste disposal . . . [o]r similar products which directly affect the design and management of major state functions involving hundreds of millions of dollars of resources and affect the state’s economy or large segments of the population.” Valid arguments can be made supporting placement of the Appellant’s position at either the I-3 or I-4 level, but her position does not reach the I-5 level which typically direct a “variety of programs.” If assigned to the S-3 and either I-3 or I-4 level, the position scores 140 or 170 points, respectively.

Complexity is the second FES factor. The assignments for the position in question are appropriately described by the Complexity level of C-3 which is described, in part, as follows:

Assignments involve . . . the synthesis of a particularly broad and diverse range of facts, objectives, views, and concepts, in order to establish innovative conclusions or recommendations. . . . Characteristic synthetic activities include directing multi-disciplinary planning or evaluation studies and developing policy proposals involving multiple programs.

In contrast, the C-2 level references work “complicated by the need to develop new measures of variables or apply more complex analytic techniques” such as “regression, linear programming, mathematical modeling; formalized cost/benefit analysis; [or] formalized case studies.” The C-4 level also requires application of “advanced technical analysis.” Nothing in the record supports the conclusion that the Appellant’s position must apply the higher levels of technical analysis referenced at both the C-2 and C-4 levels.

“Knowledge and Skill Required” is the next factor to be considered as part of the FES analysis. The PD for Appellant’s position enumerates 14 items under the heading of “Knowledge and skills required by this position” including the following:

Extensive knowledge of and skills related to the concepts, practices, principles and procedures of policy analysis and development. Specialized skills in developing and analyzing policy initiatives that are complex and highly visible.

Extensive knowledge of and skills related to program evaluation and planning. This includes analytical methods, work planning and evaluation techniques.

Specialized skills in evaluating and planning programs that are large in scope, complex and involve multiple layers of government.

Extensive knowledge of and skills related to program management and operations. Specialized skills in complex management and operations issues.



Extensive knowledge of state, federal and local government organization and programs of agricultural and natural resource use.

Extensive knowledge of the state and agency budget processes and principles.

Knowledge of broad professional scientific plant pest and disease principles and programs.

In order to conduct the policy, program and budget analysis and development responsibilities described in the PD, the position requires that level of “Knowledge and Skill” described at the KS-4 level:

The assignments require considerable to extensive knowledge of almost all the laws, policies, programs, and public issues relating to a major field of government endeavor . . . as well as familiarity with current professional thinking in the area, functional relationships to other program areas, and history of government involvement in the field.

However, the assignments do not require “expert knowledge of a highly-specialized technical field” and they do not include the responsibility to “manage a large organizational unit.” The position would have to satisfy either one of these standards in order to reach the KS-5 level.

Factor 4 in the FES analysis is “Personal Contacts and Their Purposes” which is comprised of two sub-factors, “Nature of Contacts” and “Purpose of Contacts.”

The PD provides that the incumbent is to: 1) “[c]onsult and work with program managers and leaders at the local, state and federal level, interest groups and organizations, business and industry representatives, and the University...” ; 2) “[r]epresent the division and/or department with appropriate legislative staff or the Governor’s office on division issues”; and 3) “[a]ct as a liaison with policy makers at the local, state and federal levels, including municipal, town and county officials.” Appellant’s position is correctly ranked at the NC-4 level which requires “personal contacts ... with policy-makers outside of the agency, such as division administrators and secretaries of other agencies, legislative leaders, mayors or county board chairpersons, presidents of large private firms, or high level Federal positions.”

In terms of the Purpose of Contacts sub-factor, we find that Kohl’s position is best described at the PC-3 level: “The purpose of the contacts is to defend program decisions or policies, to develop policy directions or strategy on sensitive political questions or major public issues, or to motivate the cooperation of organizations or groups in achieving agency

goals.” Goal D of the position description, “Management and performance of internal and interagency liaison activities relating to division agricultural and natural resource policies and programs” contains numerous worker activities that fit the PC-3 level.

The final FES factor is titled “Discretion and Accountability.” The “Accountability” sub-factor applies “only to positions which have responsibility for the line supervision of professional staff” so it is irrelevant to the position in question. Kohl’s position is most consistent with the D-3 level for the Discretion sub-factor. The PD provides that “the position has wide discretion in matters that significantly affect the Division’s policies, administration and programs.” This level of discretion is significantly beyond that contemplated at the D-2 level, which provides, in part:

Objectives and priorities of most work assignments are established for the incumbent, in general terms, defining the results to be obtained, relative importance of various assignments, and the general approaches to be taken.

However, it cannot be said that the incumbent is “responsible for initiating modifications to the rules or statutes that apply,” a typical responsibility at the D-4 level.

In summary, the following factor and sub-factor levels, listed with the corresponding FES points, accurately describe the Appellant’s position:

Scope and Impact	140 or 170 points
Scope S-3	
Impact I-3 or I-4	
Complexity C-3	115 points
Knowledge and Skill KS-4	110
Personal Contacts and Their Purposes	95
Nature of Contacts NC-4	
Purpose of Contacts PC-3	
Discretion D-3	80
Accountability	<u>0</u>
TOTAL	540 or 570 points

The total falls squarely within the 410 to 720 point range of the PPA – Advanced Management classification.

The record in this matter includes copies of position descriptions for 5 other positions classified at the PPA – Advanced Management level that are located in either DATCP's Division of Animal Health or the Office of Organization Management in the Department of Workforce Development. All 4 positions at DWD report to a Policy Initiatives Advisor who, in turn, reports to DWD's Deputy Secretary. The DATCP position reports to Sheila Graham who is identified as the Director of the Bureau of Administrative Services. The information in these PDs does not undermine the Commission's conclusion as to the correct classification of the Appellant's position, given the wide FES point range assigned to the classification and the absence of any official FES analysis of these other positions.

Based on the above analysis, the decision to initially allocate the position filled by the Appellant commencing on February 24, 2002, to the Administrative Manager classification was incorrect. That position was better described by the Program and Planning Analyst – Advanced Management class.

A representative of the Commission will contact the parties for the purpose of scheduling the next step in the proceeding.

Dated at Madison, Wisconsin, this 23rd day of July, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Paul Gordon /s/

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Paul Gordon, Commissioner

Susan J. M. Bauman /s/

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Susan J. M. Bauman, Commissioner

Chairperson Judith Neumann did not participate.