

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RANDAL FRISCH, Appellant,

vs.

**Secretary, DEPARTMENT OF TRANSPORTATION and
Director, OFFICE OF STATE EMPLOYMENT RELATIONS**, Respondents.

Case 23
No. 67907
PA(der)-221

Decision No. 33903-A

Appearances:

Randal Frisch, appearing on his own behalf.

Paul E. Nilsen, Assistant General Counsel, Department of Transportation, P.O. Box 7910, Madison, Wisconsin, 53707-7910, appearing on behalf of the Department of Transportation and the Office of State Employment Relations.

DECISION AND ORDER

This matter is before the Wisconsin Employment Relations Commission on Appellant Randal Frisch's appeal of Respondents' decision to deny his request for a change in the classification of his position. Prior to hearing, the parties stipulated to the following issue:

Whether Respondents' decision to deny Appellant's request to change the classification of his position from Engineering Specialist Transportation Senior to Engineering Specialist Transportation Advanced 2, effective February 2007, was correct.

A hearing was held on December 2, 3, and 18, 2009, before Kurt Stege, serving as the designated hearing examiner. The parties filed post-hearing briefs, the last of which the Commission received on July 14, 2010. The hearing examiner issued a proposed decision on July 12, 2012. Written objections were filed and the final date for submitting a written response was August 20, 2012. The Commission has consulted with the examiner and adopts the proposed decision with substantive changes identified by footnote. In addition, the Commission has engaged in minor editing of the proposed decision without substantive effect.

Dec. No. 33903-A

Appellant's Position and Classification

Appellant is employed by the Wisconsin Department of Transportation (DOT) in its multi-county North Central Region. He is engaged in project development work for highway improvement projects. Persons holding project development positions may work on more than one highway design or construction project at a time and projects have different durations.

Appellant had requested a classification audit prior to the request that generated the present appeal, and his position was reclassified to Engineering Specialist Transportation-Senior (Senior) effective December 11, 2005.

In February of 2007, Appellant initiated a second classification review of his position (the basis for the present appeal) and contended it should be classified at the Engineering Specialist Transportation-Advanced 2 (Advanced) level. Because of the nature of Appellant's tasks, any of his responsibilities after December 11, 2005 and ending in February 2007 relate to his second request.

The class specifications for the Engineering Specialist Transportation series include the following general statement:

Classification decisions must be based on the "best fit" of the duties within the existing classification structure. The "best fit" is determined by the majority (i.e., more than 50%) of the work assigned to and performed by the position when compared to the class concepts and definition of this specification or through other methods of position analysis.

The Engineering Specialist Transportation series differentiates Senior and Advanced project development positions in terms of the role (assistant project leader, project leader, project manager) and the relative complexity of the project. The specifications prohibit the movement of an individual from the Senior to the Advanced level other than through a promotional process.

DOT maintains two offices in the North Central Region. The primary office is in Rhinelander and the secondary office is in Wisconsin Rapids. During much of the relevant time period, DOT maintained two project development teams in each office. Each team is headed by a Civil Engineer supervisor. It is customary to assign a "project manager" and a "project leader" to every construction project in the region, with the manager having a higher level of duties than the leader. In many instances, DOT hires an outside consultant, usually an engineer, as project leader instead of relying upon in-house staff.

DOT uses an informal process for selecting project leaders for a project, based upon factors such as availability of staff; their experience, ability and classification; and the location and complexity of the project.

During the relevant time period, DOT's largest highway construction effort was 270 million dollars of highway work in the "Wausau corridor", i.e. contiguous with the intersection of US Hwy. 51/Interstate 39 and State Highway 29 in and around Wausau.

Appellant's responsibilities that are at issue are:

- a. Quality control for limited aspects of various construction contracts covering certain projects within the Wausau corridor;
- b. Pavement marking in various counties;
- c. Information Traffic System (ITS) for the Wausau corridor, including information displays on roadside message boards for motorists;
- d. Rib River Bridge construction; and
- e. State Highway 52.

The majority of Appellant's responsibilities during the relevant period are better described at the Senior level than the Advanced level.

ORDER¹

Respondents' decision to deny the Appellant's request to change the classification of his position from Engineering Specialist Transportation Senior to Engineering Specialist Transportation Advanced 2, effective February 2007, was correct, and the Appellant's appeal is dismissed.

Given under our hands and seal at the City of Madison, this 21st day of May, 2013.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott /s/

James R. Scott, Chairman

Rodney G. Pasch /s/

Rodney G. Pasch, Commissioner

¹ Upon the issuance of this Order, the accompanying letter of transmittal will contain the names and addresses of the parties to this proceeding and notices to the parties concerning their rehearing and judicial review rights. The contents of that letter are hereby incorporated by reference as a part of this Order.

Frisch v. DOT & OSER

MEMORANDUM ACCOMPANYING DECISION AND ORDER

This matter is before the Commission for review of the decision to deny a requested change in the classification of Frisch's position from Engineering Specialist Transportation-Senior (Senior) to Advanced 2 (Advanced), effective February 2007. As the Appellant, Frisch has the burden of proof and must establish by a preponderance of the evidence those facts necessary to show that the decision *not* to classify his position at the requested level was in error. Harder v. DNR & DER, Case No. 95-0181-PC (Pers. Comm. 8/5/1996). However, the Commission's analysis is a *de novo* review and is based on the record evidence. Solin v. DNR & OSER, Dec. No. 31424 (WERC, 11/2005). The Commission considers an appellant's permanently assigned duties during the relevant time period and then seeks to fit those duties into the classification specifications that are at issue. The specifications have been promulgated by the Director of the Office of State Employment Relations (OSER) as provided in Sec. 230.09(1), Stats. The Commission's role is to apply the specifications, rather than to rewrite them to reflect the equities of a particular case. Zhe et al. v. DHSS & DP, Case No. 20080-0285-PC (Pers. Comm. 11/19/1981) (even though the specifications were outdated and created salary inequities, the Commission was bound by them and could not rewrite them). Accord, Peterson v. DOA & OSER, Dec. No. 32814-A (WERC, 9/2009).

The Commission must frequently interpret the specifications by applying language that is vague or even inconsistent. The Commission's goal is to determine whether the requested classification better describes the employee's duties. The process is explained in Steinke v. DNR & OSER, Dec. No. 31103-A (WERC, 2005) as follows:

Classification specifications are comparable to administrative standards. Their application to a particular position involves first determining the facts as to the position and then exercising judgment as to which classification best describes, encompasses or fits the position. Although that process involves some discretion when weighing factors against each other, it is essentially the application of a standard to a set of facts. Division of State Personnel v. State Pers. Comm. (Marx), Court of Appeals, Dist. IV, 84-1024, Nov. 21, 1985. The specification providing the "best fit" is used to determine the actual classification. The "best fit" is determined by the specification reflecting job duties and activities within which the employee routinely spends a majority of his or her time.

Higher level work that is performed on only a temporary basis does not qualify a position to be classified at the higher level. Graham v. DILHR & DER, Case No. 84-0052-PC (Pers. Comm. 4/12/1985). The focus of this appeal and other analyses of the proper class level of a given position are on responsibilities that management has permanently assigned to the position. The record in the present case indicates the parties agree that all of Frisch's

project assignments during the relevant time period were consistent with continuing responsibilities that were expected to be assigned to his position in the future. In other words, none of his projects reflected temporary rather than permanent responsibilities.

Frisch is one of several individuals employed in DOT's Wisconsin Rapids office who are responsible for various aspects of the design and construction of highway transportation projects within the agency's North Central region. Wisconsin Rapids is one of two DOT offices in the region. During the relevant time period, both offices had two units in their Project Development Section. All of the construction projects within the region were assigned to one of the four units. Each unit was led by a supervising engineer and included other engineers who typically served as project managers. Each unit included multiple and variously classified Engineering Technician positions and Engineering Specialist positions.

Projects vary in terms of size and complexity. One project manager and one project leader are customarily assigned to each project and the manager oversees the project leader. The majority of project leaders are consultants under contract, rather than State employees. Typically, an assessment is made in August regarding what State staff is available to administer projects during the following construction season, and estimates are made from that assessment regarding the need for consultant project leaders. Consultant project leaders are usually engineers.

DOT project assignments are almost always for the duration of the project.

The process for selecting project leaders prior to actual construction is informal; it involves discussions between project managers and supervisors regarding such factors as the availability of potential project leaders, their experience and ability, their job classification, and the location and anticipated complexity of the project. For purposes of this appeal, the four different levels of complexity (from least complex to most) are small, medium, large, and complex. There is no formal protocol for assigning a complexity rating to individual projects. However, a variety of factors are typically considered when predicting complexity.

The classification specifications

The two classifications that are at issue in this case are described at length in the 16-page Engineering Specialist-Transportation specifications. The relevant portion of those specifications follows:

E. Definitions

1. Leadworker: An employee whose permanently assigned duties include training, assisting, guiding, instructing, assigning and reviewing the work of two or more permanent full-time

equivalent classified employees in the Lead worker's work unit as assigned and documented on the work unit's organization chart. . . .²

3. Project: A well-defined sequence of activities that, when completed, result in a tangible product. Tangible products can include: development of a bridge or road design or construction of a road or bridge project.
4. Project Manager: The person having primary responsibility over the scope, schedule, budget, resources, and overall project quality. The project manager will consider advice and alternative solutions from team members, functional managers, and central office support units to meet the project objectives. Generally oversees a group of projects. May have one or more project leaders reporting to them.
5. Project Leader: The person having responsibility for coordinating and performing day to day project activities under the direction of a Project Manager.

II. DEFINITIONS

[SENIOR]

This is an objective level for positions that work under general supervision for positions in the Division of Transportation System Development – Regional Offices and Statewide Bureaus; Division of Transportation Investment Management. At this level the employee has developed an understanding of the program (and related policies and procedures) and developed the necessary skills to function at the full performance professional level. The work assignments include the full range and scope of the employee's specific program duties and require a high degree of interpretation. Positions at this level have extensive authority and independence in carrying out their assigned responsibilities and make decisions independent of supervisory oversight, with the work being reviewed after the decisions have been made.

² The Commission has modified the proposed decision by adding part of the definition of leadworker found in the specifications.

In order to be at the Senior level, positions must meet one of the allocations indicated below.

[ADVANCED]

This is an advanced and/or leadworker level for positions that work under general supervision in the Division of Transportation System Development – Regional Offices. These positions function as the sole coordinator or leadworker in their assigned program area. These positions must be filled through competition not the reclassification process.

This is an objective level for specified positions that work under general supervision in the Division of Transportation System Development – Statewide Bureaus and the Division of Transportation Investment Management. Positions at this level provide advanced level expertise, function as the primary contact for their specific program area or project, and perform the most complex, difficult, and advanced work that may cross program lines. Employees at this level have responsibilities that may require high level contacts with the public. Work assignments are broad in scope and require the incumbent to use independent judgment in decision-making. Work is performed in response to program needs as interpreted by the employee with little or no review of the work. . . .

In order to be at the Advanced 2 level, positions must meet one of the allocations indicated below.

ALLOCATIONS INCLUDE:

. . .

SENIOR - Regional Project Development Specialist

This is objective level work for positions that are project leaders for small, medium and large design or construction projects and may also assist on large complex projects. Work is reviewed after implementation and may include construction and/or design duties. Specific construction duties include, but are not limited to projects relating to: reconditioning of roadways with substantial grading of the existing roadway or new roadways that include retaining walls, bridges and different types of pavement. There may be traffic control and/or detours. There is public involvement, as well as environmental, right of way, and erosion control issues or concerns. . . .

[ADVANCED]- Regional Project Development Specialist

This is advanced level work. Positions at this level function as a project manager/leader, the complexity of the projects include assignments which have numerous and varied steps, methods, and procedures. The assignments are complicated and may be evolving as the project progresses. Specific construction duties include, but are not limited to: working on projects that may be staged, involve numerous bid items, large dollar values, complex layout, utility conflicts, numerous subcontractors, adversely affected businesses, and sensitive environmental issues. The projects may also include various types of grading, drainage, addition, and removal of structures and varying levels of base course. . . .

Competing methodologies

Appellant suggests that the Respondents' method for classifying positions as either Senior or Advanced "is a model of overlap and vagueness designed to rationalize any decision the Respondent wishes to impose." He proposes that one appropriate way to decide the "best fit" question is to rely on his time code records covering the period from March 1, 2005 to February 1, 2007. Appellant and other DOT employees must account for their time in pay status according to the type of work they are performing. According to Appellant, all 2436.9 hours he spent that was assigned to one of four charge codes (Evaluate Work Operations, Consultant Management Oversight, Project Management, ITS Operations) were work at the Advanced level, while his remaining 1006.85 hours during this period (spent on Construction Contract Accounting, Materials Records & Plant Review, Inspections General Field, Training, General Field Work, General Office Work, Professional and Technical, Compute Quantities and Details) was Senior level work.

The Respondents, by contrast, maintain that the classifications are project-centric and that once the complexity of a project is ascertained and the employee's role on the project is established, either all of the time the employee allots to that project is identified as Senior level work, or all is identified as Advanced level work.

The Commission concludes that the specifications compel us to follow the path outlined by Respondents and we apply a project-centric approach in the remainder of this decision. Appellant failed to show a direct correspondence between the charge codes and the terms used in the class specifications. In at least general terms, Respondents' analysis uses the terminology and the methodology indicated by those specifications. Finally, Feeney v. DER, Case No. 92-0025-PC (Pers. Comm. 6/13/1996) clearly sets forth the appropriate methodology for determining whether the projects assigned to an employee were "large to complex" for purposes of an earlier version of the Engineering Specialist – Transportation class specifications. Once it was determined whether an individual project satisfied the "large to an individual project satisfied the "large to complex" standard, the classification decision rested on whether Feeney had been spending the majority of his time on these more complex projects.

The analysis required in the present matter is as follows: In order to determine that the duties assigned to a position are at the Advanced level, the employee must show that the portion of his “base hours” spent on Advanced-level projects (where project level is determined based on the employee’s role *and* the complexity of the project) is greater than 50%, where “base hours” will be the term we use for the total hours in pay status less the number of hours on paid leave during the relevant time period.

Relevant time period for the analysis

The relevant time period in this matter reflects the somewhat fluid nature of the Appellant’s responsibilities, the duration of specific assignments and, to a certain extent, the agreement of the parties. Because of the proposed effective date of February 2007, the Commission has no need to examine duties that Frisch began performing after that date.³

The parties have not stipulated to a start date for the period of analysis and their positions on this point have appeared to vary over time. However, both parties have referenced the period commencing December 11, 2005 in one or more of their submissions and we agree that this is appropriate because of the peculiar situation here. For one thing, Frisch had successfully sought reclassification prior to the dispute at issue. The effective date of that transaction was December 11, 2005 and the 2005 transaction is not at issue in the present matter. As a consequence, the resolution of the present dispute may not be based upon duties he was performing prior to the December 2005 date. The other key factor is that Frisch’s duties varied during any given day, week, month or season, reflecting the variability of the projects he was assigned, their different durations and their cyclicity. Under these circumstances, we believe that the longest available period will provide the most accurate assessment of management’s intent for his permanently assigned responsibilities as of the February 2007 effective date.⁴ This same goal is reflected in Mueller v. DOT & DER, Case No. 93-0109-PC (Pers. Comm. 2/27/1997). Mueller was a DOT employee involved in highway construction and the classification dispute related to the Engineering Specialist series, although it arose from a classification survey. The holding recognized that a position’s proper class level resulting from a classification survey is typically determined based on the duties and responsibilities

³ A request to *reclassify* a position normally involves a three-part analysis. First, the classification level of the position must be determined. The second question is whether the changes in duties that precipitated the reclassification were logical and gradual. Third, it must be determined whether the incumbent of the position has performed the permanently assigned duties for a minimum of six months and should be regraded and allowed to stay in the position at the higher level, or whether the position should be opened to competition. Usabel. v. DER, Case No. 84-0005-PC (Pers. Comm. 12/6/1984). In contrast, a position may be *reallocated* due to merely a “logical change in the duties and responsibilities.” Sec. ER 3.01(2)(f), Wis. Adm. Code. Here, the parties have agreed to a statement of issue that does not reference reclassification or reallocation, merely posing the issue as whether the decision to deny the “request to change the classification of his position . . . effective February 2007, was correct.”

⁴ If there was a showing that Frisch’s duties cycled annually so that his duties during December through February were not representative of his duties during a typical 12-month or 2-year period, and if it could be shown that counting these three months twice caused a difference in the outcome of this case, there would be a strong argument to use the 12-month period ending February 2007 rather than a 15-month period ending at that time.

actually assigned to the position during a discrete and quite limited period of time immediately prior to the effective date of the survey. However, that rule did not apply where “individual projects could last for many months and . . . the mix of projects and employe[e]s at any given time might preclude assigning an employe[e] to a project of similar complexity to those projects normally assigned the employe[e].” The Commission considered projects performed over three construction seasons. The decision in Feeney v. DER, Case No. 92-0025-PC (Pers. Comm. 6/13/1996), another survey case, reviewed the employee’s work over the course of a period of approximately two years prior to the effective date of the reallocation. *See also, Stensberg et al. v. DER*, Case No. 92-325-PC, (Pers. Comm. 2/20/1995) (for seasonal or cyclical work, it is appropriate to look at the full year).

The record established that after December 11, 2005 through the end of February 2007, Frisch was in pay status for a total of 2,771.75 hours and had 510.75 hours of paid leave. Therefore, Appellant had 2,261 “base hours” for the period we are examining to determine whether Respondents’ decision to deny the request to change the classification of his position from Senior to Advanced was correct.

The parties agree that five of the distinct work assignments to Appellant are at issue during the period in question:

<u>Assignment</u>	<u>Hours Worked on the Assignment</u>	<u>% of Base Hours</u>
1. Quality control	612.75	27.1%
2. Pavement marking	160.00	7.1%
3. ITS	477.75	21.1%
4. Rib River Bridge	427.50	18.9%
5. Hwy 52	365.50	16.2%
Other assignments/ work	217.50	9.6%
Totals:	2,261.00	100%

Complexity of, and Appellant’s role in, the assignments at issue

This portion of the Commission’s decision addresses each of the five assignments that are in dispute in terms of the two distinctions identified in the specifications: a) Appellant’s authority; and b) the complexity of the underlying work. The specifications reference numerous factors that *may* be considered when differentiating complexity, but the factors lack quantifiable standards for applying them: (“numerous bid items, large dollar values, complex layout”, etc.) If, as here, the standards identified in a classification rely upon non-specific and undefined terms, the Commission will take the analysis of subject-matter professionals into account. Marx v. DER, Case No. 91-0087-PC (Pers. Comm. 2/5/1993) (where other

information was inconclusive, program experts were relied upon heavily when assessing what satisfied the standard of “most advanced”); Feeney v. DER, Case No. 92-0025-PC (Pers. Comm. 6/13/1996) (in an appeal of a reallocation from the appellant’s position to Engineering Specialist – Transportation – Senior rather than Engineering Specialist – Transportation – Advanced 1, “[m]any of the distinctions between [the] kinds of projects (large and complex) involve general, relativistic terms *which can best be analyzed by a professional with experience in the field in question.*”) (Emphasis added). Therefore, the Commission has placed some weight on the testimony of various DOT professional engineers regarding the relative complexity of Appellant’s assignments. With all of the relevant work having been completed by the time of the hearing in this matter, we have the benefit of looking back at the actual work that was performed. As a consequence, the weight we give to the testimony of the various witnesses should reflect the degree of their familiarity with the project as it was carried out. To the extent the record shows that an engineer misunderstood the nature of Appellant’s work on a given project, the weight of that engineer’s assessment of the project’s complexity should be reduced accordingly.⁵

1. Quality control assignment

This assignment applied to four separate contracts that each included multiple project numbers, all of which listed someone other than Frisch as the Project Leader. The projects were all part of the Wausau corridor work. The aggregate of all the Wausau corridor projects covered about 18 miles of East/West Hwy 29, and about 7 miles of the North/South highway that included portions of Highways 51, 39 and 29. The total cost was approximately \$270 million. The aggregated work easily met the standard for a “complex” project, and Respondents agreed as much. Frisch’s role extended beyond what were initially issues of concrete quality control to include quality control for storm sewers, grading and asphalt.

The Appellant’s assignment was to ensure that relevant construction specifications were followed and proper techniques were used to maintain consistency and quality of workmanship. In furtherance of these objectives, he coordinated with different project leaders for corridor projects when they were doing particular kinds of work, scheduled his time to be present while the work was performed, worked with the inspectors assigned to each project, and sometimes provided them with guidance and training regarding proper inspection techniques and contractor specifications. Most of the inspectors whose work the Appellant addressed were consultants, although some were DOT employees. The Appellant worked with both inspectors and project leaders to resolve problems, and, if necessary, to address unresolved problems with the project managers.

Frisch was not “Project Leader” for the individual corridor projects as that term is defined in the relevant specifications. He wasn’t *the* person for coordinating and performing all the day-to-day activities on these projects. He worked, in part, with other persons who were the project leaders to carry out his responsibilities.

⁵ The Commission has added the last three sentences to this paragraph to better explain how we reached our conclusion.

Frisch's assignment fit the "Assistant Project Leader" language in the Senior allocation: "[M]ay also assist on large complex projects." He assisted on a specific aspect of a collection of corridor projects during a specified period.

Appellant also asserts he worked in a "leadworker capacity" with respect to the quality control assignment. An employee's status as a leadworker is defined in the Engineering Specialist specifications as a *permanent* assignment that is "documented on the work unit's organization chart." Appellant fails to satisfy the latter⁶ condition and it is unnecessary to address additional requirements found in that definition. Management never formally conferred leadworker status to Frisch's position.

In his objections to the proposed decision, the Appellant suggests the Commission simply ignore whether leadwork status was documented in order to apply his own definition of leadwork. The Commission may not ignore the specifications. Mertens v. DER, Case No. 90-0237-PC (Pers. Comm. 8/8/1991) (argument to ignore one word in the specifications to allow the appellant's position to fit at the higher level was rejected). In addition, Appellant contended he was a leadworker because he trained, assisted and reviewed the work of two classified employees in his work unit in terms of their responsibilities for on-site inspections of concrete pavement, grading, storm sewers and asphalt paving. There is no evidence that the two classified employees in question spent all their work hours on quality control or that the only aspects of the projects they checked were those aspects for which Frisch bore some responsibility.⁷

2. Pavement marking assignment

Frisch's second assignment that is in question was as Project Leader for painting over or removing and replacing existing pavement markings in multiple counties, but not throughout the North Central Region. Appellant's duties included resolving issues arising from incomplete and/or incorrect project plans. Appellant conceded during his testimony that by current standards, his district-wide pavement marking work might fit the Engineering Technician classification series, which describes lower classifications than in the Engineering Specialist series. Frisch maintained that he was chosen for the project because all others who were available lacked adequate construction skills and experience. The fact that other candidates for the assignment lacked practical experience in this area of construction does not make the project "complex." The listed project value of \$283,734.80 is well below what might be expected for a complex project. Appellant has also not attempted to show that other earmarks of complex projects (such as construction staging, numerous bid items, complex layout, utility conflicts, numerous subcontractors, adversely affected businesses, and sensitive

⁶ The Commission has modified the proposed decision by deleting language that suggested these responsibilities were not "permanent." It is unnecessary for the Commission to conclude whether or not the assignment was permanent and declines to do so. However, we note that one witness testified that Ray Vega's inspection work only lasted "a while" and a second witness testified that Vega's work only extended a couple months.

⁷ The Commission has added this paragraph.

environmental issues) actually characterize this project. He has not met his burden of proof to show that the district-wide pavement marking project was complex or that his work on the project “best fits” the Advanced level.

3. ITS (Intelligent Transportation System) assignment⁸

One of Frisch’s assignments during this period covered two project numbers that encompassed the region’s initial application of a system for electronically sensing traffic densities in different locations (in this instance relative to the Wausau corridor work) and then employing temporary and permanent message boards to alert drivers during their approach to construction areas and to advise them of approximate travel times. No comparable system had previously been installed anywhere in the State. There is no dispute that Frisch served as the project leader for this assignment. The parties disagree about whether the assignment qualifies as a “complex” project so as to satisfy the standard for Advanced-level work.

The ITS assignment served to support the corridor construction work and the system was expected to operate for the full 5-year duration of that work. Even though the message boards were temporary in the sense that they were “portable,” the system in question was very different from the temporary systems set up for a project to be completed in a single construction season.⁹ Tim Hanley, a Civil Engineer-Advanced, was the ITS Program Manager for the North Central region and provided oversight to the entire program, but his role was more focused on design work carried out from DOT’s office rather than the field work where Frisch coordinated and performed day-to-day construction activities. Significant aspects of ITS construction work are not part of typical highway projects. While Daniel Holloway was the ITS project manager, he had very little to do with it and, due to the unique electronics that were involved, other engineers were much more familiar with the technology and the issues raised by the project in the field.¹⁰

The Commission is satisfied that *if* this had been the third or fourth ITS assignment in the region, it would not qualify as complex for classification purposes. By that time, protocols would already be established, equipment would be standardized and software would be debugged. Typical factors such as number of bid items and cost of the project would dominate the analysis. However, this was the initial construction assignment relating to a distinct function which meant that the project leader had to deal with new equipment, new software, connectivity to a control center in Milwaukee, an atypical funding source, and continuing responsibilities for training and operational assistance. A local wireless internet business

⁸ The Commission has modified the proposed decision to reflect a different conclusion as to the complexity of this assignment, primarily because of our conclusion that the classification specifications recognize the “first time” nature of a project such as this may be a factor when assessing its complexity, and because DOT did not follow its standard procedure for assessing complexity prior to assignment.

⁹ The Commission has added this sentence to better reflect the record.

¹⁰ The Commission has added this sentence to better reflect the record.

installed a system that interfered with the ITS transmissions and Frisch worked with the business owner to identify the precise nature of the interference and to resolve the problem. Time constraints added to the complexity of the ITS project and its unique nature meant that the standard process for assigning projects was not followed.¹¹

One question raised by this appeal is whether the existing language in the specifications for the Advanced level is sufficiently flexible to reflect the complexities inherent with the initial assignment of an entirely new category of construction. The Advanced level allocation includes the following sentence: “The assignments are complicated and may be evolving as the project progresses.” We believe this language may be read broadly to include the ITS project where protocols had not been established, equipment had not been standardized and software had not been debugged before Frisch served as project leader. The fact that the record does not establish a pattern of assigning these types of projects to positions at the Advanced rather than Senior level is not determinative. This particular novel assignment was placed in Frisch’s hands without the benefit of the normal assessment process. Unforeseeable events underlined its high level of complexity.¹²

4. Rib River Bridge assignment¹³

One segment of the Wausau corridor work was construction of an additional bridge over the Rib River. The project number that Frisch addressed was only the first half of the bridge, and a second project number was to be assigned to the second half. Project cost was nearly \$1.9 million, and it included 65-70 bid items. There were already three two-lane bridges in the immediate area. Two of them were part of Hwy. 51/29 (one for each direction of traffic) and the third carried County Hwy R. The third bridge was also reconstructed as part of the Wausau corridor work, and that construction had not been completed before the Rib River Bridge construction commenced. However, both projects required formation of a “causeway” into the Rib River to serve as a platform for construction cranes. The causeway was built as part of the third bridge project. The new Rib River Bridge was a fourth span between the two highways and the project did not alter the existing structures. However, County Hwy. R served as the sole access route for the new fourth bridge.¹⁴

¹¹ The Commission has added the last two sentences to better reflect the record.

¹² The allocation in the specifications for a regional project development specialist at the Advanced level also includes the following sentence: “Specific levels of projects may be described at the Senior level, but the incumbent may exercise a greater degree of independence and *[is] involved with assignments that have a greater consequence of error.*” There is no evidence that the consequence of error in the ITS project would be greater than on other types of highway construction projects.

¹³ In his objections to the proposed decision, Frisch referenced construction information relating to this assignment that was not of record. The Commission has not placed any weight on those portions of the objections.

¹⁴ The Commission has substantially modified the section of the proposed decision addressing Frisch’s Rib River Bridge assignment to reflect our analysis. The key area of change relates to our conclusion that Frisch did not quite qualify as *de facto* project leader. We have also addressed the “staging” factor more thoroughly and have more explicitly balanced Frisch’s environmental responsibility vis-à-vis other complexity factors.

DOT Civil Engineer Mike Baumann was denominated as project leader for both the bridge reconstruction (County Hwy R) and the new bridge. Frisch was listed as the assistant project leader for the fourth span. Baumann's designation reflected his responsibilities for coordinating numerous projects within the Wausau corridor, rather than for coordinating day-to-day construction activities for each bridge. For the most part, Frisch served as the *de facto* project leader on the new bridge because he performed the majority of the duties normally associated with the project leader role. However, Baumann did not forego all of those responsibilities. He oversaw the permitting process for the causeway, was actively involved in negotiating an agreement satisfactory to the Army Corps of Engineers for transferring the causeway from the prime contractor for the bridge reconstruction to the prime contractor for the fourth span, and Baumann collaborated with Frisch and his counterpart on the County Hwy R project to decide scheduling issues that had an effect on both projects. Although Frisch performed the majority of the project leader duties and his role was definitely more than a typical assistant project leader, it was somewhat less than that of a project leader as that term is used in the classification specifications. Our conclusion that his role did not quite meet the capacity of a full project leader undermines Frisch's contention that his work on the Rib River Bridge was at the Advanced level rather than the Senior level.

The second classification element for analyzing Frisch's Rib River Bridge assignment is project complexity. If we look at the key factors listed at the Advanced level, the assignment fails to meet the "complex" standard.

In his objections to the proposed decision, Frisch strenuously contends that this bridge project was "staged." We agree to the extent there was some traffic staging on County Hwy R to allow certain materials and equipment to reach the Rib River Bridge worksite. In other words, one of the two lanes on R had to be closed and signalers had to be posted on R to safely guide some work-related traffic to Frisch's job-site. However, testimony showed that traffic staging is required for nearly every highway construction project. Traffic staging does not support rating Frisch's Rib River Bridge as a complex project. This is especially true because Baumann retained a key role in scheduling both the County Hwy R work and the Rib River Bridge project. Traffic staging contrasts with construction staging, an example of which would be sequentially closing one of two northbound lanes of divided highway traffic and completely rebuilding one lane before rebuilding the second lane of the same highway segment. We interpret the class specifications for the Advanced allocation to refer to construction staging rather than traffic staging. Frisch's project was limited from the start to construction of the first half of an additional bridge for Highway 51/29. It was a distinct project that did not involve construction staging. We find that Frisch's traffic staging work falls within the scope of "traffic control" that is listed as a function for a Senior level project.

The language in the specifications for the Regional Project Development Specialist allocation in the Advanced classification refers to "construction duties" that include "working on projects that may be staged, involve numerous bid items, large dollar values, complex layout, utility conflicts, numerous subcontractors, adversely affected business, and sensitive environmental issues." We have already noted that Frisch's Rib River Bridge project was not "staged" as that term is used in the Advanced-level allocation specifications. The evidence also

showed that the project's 70 bid items were not "numerous," there were no utility conflicts, no "adversely affected businesses," and the \$1.9 million was not a "large dollar value." There was no evidence that the project had a complex layout or numerous subcontractors. Therefore, the Rib River Bridge clearly did not have seven of the eight attributes for a complex project specifically listed for the Advanced allocation.

Frisch addressed several environmental issues while completing his Rib River Bridge assignment. However, he began the project with a completed causeway already in place and there is no suggestion that constructing the first half of the bridge included removing the causeway from the riverbed. It would be used again for the second construction stage. Nevertheless, Frisch addressed other environmental issues during his project stage. They included building coffer dams for each pier of the bridge, segregating contaminated sediment removed during construction of those coffer dams and returning the same sediment to the river bottom after construction was complete. He also oversaw construction of a pathway, including a log boom, to provide turtles access around the construction activity. Nevertheless the mere fact that Frisch addressed environmental issues during the Rib River Bridge project does not automatically require that project to be deemed "complex." The Senior allocation refers to projects with environmental issues and concerns while the Advanced allocation adds the word, "sensitive."

We acknowledge that Frisch's environmental responsibilities were a single factor affecting project complexity. However, they have to be balanced against the seven factors limiting complexity as well as Frisch's reduced role as something less than full project leader on the bridge. Under these circumstances, Frisch has not shown that his work on the bridge meets either the role or complexity necessary for calling it work at the Advanced level.

Mike Baumann distinguished Frisch's project from another bridge construction project in the corridor that qualified as "complex." While Appellant took the position that any bridge over \$1 million should be considered complex, that dollar figure is not a standard relating to assessing projects for classification purposes.

The Rib River Bridge assignment does not qualify as Advanced-level work.

5. Highway 52 assignment

Appellant's final assignment that is in dispute is for the Hwy 52 contract covering three different project numbers. The assignment is atypical in the sense that it was made after most of the traditional duties of the project leader had been completed, including almost all of the actual construction. The \$1.8 million contract covered reconstruction work in downtown Wausau. The firm True North, the outside consultant that had been performing the role of project leader, had been "debarred" from working on construction projects with the State, and Appellant was assigned the task of completing the remaining responsibilities.

Respondents take the position that Appellant's work on this assignment has to be assessed in the context that he was merely involved with the tail-end of the contract and missed out completely on many of its more complex aspects. Appellant contends that the particular duties he performed after receiving the assignment were "complex," so the time he spent on them must be considered Advanced.

The parties' positions fail to take into account the project-centric language of the specifications. It doesn't matter *when* during the course of the contract that Frisch served as the project leader. As long as he was assigned that role and the project satisfies the "complex" standard, the time he spent on the assignment was Advanced-level work for classification purposes. Our conclusion is again consistent with the analysis in Feeney v. DER, Case No. 92-0025-PC (Pers. Comm. 6/13/1996). There, the employer argued that because the employee had not been responsible for some projects "from start to finish," his responsibility should be considered diminished for classification purposes. The Commission rejected that argument, concluding that the number of hours the employee spent working on a project designated, in that instance, as "large to complex" was still time spent on a "large to complex" project just as if he had start-to-finish responsibility.¹⁵

The witnesses did not directly address the question of whether the entire Hwy 52 contract reflected a "large" or "complex" project. However, it was in an urban setting, qualifies as a "staged" project, required coordination with utilities, had significant impacts on business, was a complex layout, and included 270 bid items. While the Commission would have preferred if several experienced DOT supervising engineers had supplied their opinion about the relative complexity of a project with these attributes, we believe it satisfies the "complex" standard for the Advanced level.

Results applied to base hours

Appellant, bearing the burden of persuasion in this matter, established that he was the project leader on a complex project for the 365.5 hours that he spent on the Highway 52 assignment and the 477.75 hours that he spent on the ITS project during the period from December 11, 2005 through the end of February 2007. This total of 843.25 hours, which represents his Advanced assignments, compares to the 1,417.75 hours he spent during the same period on his Senior-level work.¹⁶

The parties drew comparisons between the Appellant's responsibilities and other positions classified at both the Senior and the Advanced levels. These comparisons support the

¹⁵ In Feeney, the Commission identified a possible exception: "This conclusion might be different if appellant regularly had been assigned to perform only specific parts or kinds of work on large to complex projects, but this was not the case." Similarly, Frisch was not regularly assigned to finish construction projects where someone else had served as project leader for the remainder of the project.

¹⁶ The Commission has modified this paragraph to reflect our conclusion that the ITS project qualified as an Advanced-level project.

conclusion that the assignments to Appellant's position were predominantly at the Senior level. In making these comparisons, the Commission has adopted the caveat advanced by Respondents that qualifies certain comparisons; Because employees who are promoted into the Advanced classification are expected to complete their pending assignments as they fill their new position, comparisons to many of their initial duties are actually to projects that do not reach the Advanced level.

Because the Appellant has failed to sustain his burden to show his position was better described at the Advanced level, it is unnecessary for the Commission to address the questions of whether the requested transaction would be identified as a reclassification or a reallocation, and whether Appellant should be regraded or required to compete to fill the vacancy at the higher level. However, the specifications explicitly require that any Advanced position be filled by competition. Appellant would not have been entitled to a regrade.

Respondents' classification decision must be affirmed.

Dated at Madison, Wisconsin, this 21st day of May, 2013.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott /s/

James R. Scott, Chairman

Rodney G. Pasch /s/

Rodney G. Pasch, Commissioner