STATE OF WISCONSIN PERSONNEL COMMISSION

JOHN R. STASNY,

Appellant,

v.

DEPARTMENT OF TRANSPORTATION,

Respondent.

Case No. 78-158-PC

DECISION
AND
ORDER

NATURE OF THE CASE

This is an appeal pursuant to §230.45(1)(c), (1977), Stats. of the denial of a grievance at the third step. This matter was heard on January 22 and 23, 1979, before Commissioner Edward D. Durkin acting as hearing examiner. Posthearing briefs were filed on March 23, April 11, and April 23, 1979.

FINDINGS OF FACT

1. Appellant has been in state classified civil service with the Department of Transportation (DOT) for over 22 years and at all relevant times has been employed in the Bureau of Enforcement and Inspection of the Division of Motor Vehicles. In 1970, he was promoted to Training Officer I.

2. The appellant began work in 1972 on a project known as the TIME System pursuant to an agreement between the DOT and the DOJ (Department of Justice). The TIME System is a computer system designed to gather, store, and retrieve information relating to law enforcement programs. Appellant's duties as a TIME field representative included

giving training at the local level to personnel of various local law-enforcement agencies on the use of the TIME System and providing aid in solving problems relating to the system.

3. Four other people did relatively similar work on the TIME System. Three of the others were employes of the DOJ. The other person, also from DOT, pursuant to the agreement between the agencies, is employed in the Bureau of Data Processing of the Division of Business Management. Appellant has more seniority with DOT than the person from the Division of Business Management, Mr. LaBlonde.

4. Mr. LaBlonde, in addition to performing training functions, handled Division of Motor Vehicle Driver Examiner Station terminals, acted as liason between DOT and the Crime Information Bureau with respect to DOT driver record and vehicle registration files, and resolved problems encountered by local law enforcement agencies with respect to these files.

5. The employes working the TIME System were under the direction of Mr. Larry Quamme and Mr. James Donovan of the DOJ. However, DOT retained supervisory authority over the appellant.

6. In the fall of 1977, DOJ made a decision to change the method of training for the TIME System. Instead of training at the individual, local law-enforcement agencies, the training was to be on a regional basis.

7. On March 8, 1978, appellant taught his first regional training session on the TIME System. Appellant's immediate supervisor, Mr. Donovan, was in attendance at that session. Mr. Donovan's written report

pointed out many short comings by appellant and was especially critical of his lack of proper preparation. His report was sent to Mr. Quamme.

8. On March 17, 1978, Mr. Donovan and Mr. Quamme met with Major Lacke and Mr. Bennett of DOT. Appellant's performance at the training session on March 8, 1978, was discussed along with the future need for all five instructors in the TIME System program.

9. On March 20, 1978, Mr. Quamme met with Mr. Stasny in Mr. Donovan's office and discussed his performance on March 8, 1978. Appellant was informed he would not be teaching the next day, as originally scheduled, but instead just participating.

10. On March 27, 1978, appellant informed Major Lacke by memo of his version of the criticism he had received on his teaching abilities.

11. On April 17, Mr. Quamme made the decision that appellant was not needed on a full-time basis anymore by DOJ, for the reasons set forth in writing to Robert Bennett of DOT in April 20, 1978. (Appellant's Exhibit 6)

12. On April 28, 1978, appellant's assignment to teach on May 3rd was discussed between Mr. Quamme and Mr. Bennett. It was decided to allow appellant to teach the course. Mr. Bennett, Mr. Donovan, and a Mr. Evans were in attendance as observers. Following the teaching assignment, Mr. Donovan and Mr. Evans of DOJ wrote reports critical of appellant's presentation. However, Mr. Bennett's memo was very positive.

13. Mr. Bennett, in his memo of May 3, 1978 (Appellant's Exhibit 8), did mention that, since DOJ no longer needed the position occupied by appellant, DOT would therefore withdraw it.

14. On May 17, 1978, Administrator Harvey notified appellant that effective May 22, 1978, his services would no longer be utilized as an instructor in the TIME System and that he would be transferred to the Division's Training Academy no later than July 1, 1978.

15. Mr. Stasny reported to the State Patrol Academy on July 5, 1978, to begin duties as a training officer there. His first assignment was to develop a communications training program for local law-enforcement agencies.

16. On the same day, another uniformed officer was assigned to the Training Division at the Academy. He was assigned immediately to teaching classes. He had just returned from nine months at Northwestern University. Appellant was not assigned to teaching classes, but was instructed to help doing clerical duties when there was a need for such aid.

17. After approximately 30 days on his new assignment, appellant was unable to continue work because of high blood pressure. That condition has continued and appellant has not returned to work as of the date of the hearing six months later. He also has not been transferred to any other position as a Training Officer I.

18. The appellant's assignment to the training academy and from the TIME program was effectuated by the administrator of the Division of Enforcement and Inspection, William Harvey, without prior consultation with the secretary of the Department of Transportation, and without the approval of the administrator of the State Division of Personnel.

19. The appellant pursued a non-contractual grievance which was

denied at the third step and appealed to the Commission. The statement of the grievance was as follows:

> "After 22 years of service with the State, at Madison, I have been transferred to the Academy at Fort McCoy. This move has caused considerable hardship to both me and my family.
> I have been denied the opportunity to transfer to the positions within the Madison area which have become available.
> Relief Sought: Reassignment to the Madison area or transfer to an appropriate position located within the Madison area.

20. In the oral discussions with management as his grievance was processed, the appellant presented some but not all the grounds of objection to the transfer that were set forth in his bill of particulars filed January 2, 1979. Issues numbered (1) and (4) were not raised. The bill of particular's contents are as follows:

> "The Appellant contends that his transfer from Madison to the Training Academy at Fort McCoy was illegal, arbitrary, and an abuse of discretion for the following reasons:
>
> (1) It was not properly approved in accordance with sec. 230.15(3) and 230.29, Stats.
>
> (2) There was no need for an additional Training Officer position at Fort McCoy and the Appellant has been forced to perform duties totally unrelated to his job classification;
>
> (3) The Appellant was involuntarily removed from his position in Madison and reassigned to the Training Academy at Fort McCoy even though he had more seniority/longevity than another employe having substantially the same duties and responsibilities when the stated reason for this personnel action was the need for a reduction in staff in Madison;
>
> (4) The underlying motivation for this transfer was disciplinary but was stated to be a reduction in force because a disciplinary action in this situation could not have been sustained; and
>
> (5) The duties performed by the Appellant while assigned to the Training Academy at Fort McCoy could as easily have been performed in Madison.

21. The appellant's transfer proximately caused certain emotional

stress, physical strain, and increased medication requirements for high blood pressure, as set forth in Appellant's Exhibit 18, and which condition caused him to take medical leave of absence.

CONCLUSIONS OF LAW

1. This appeal is properly before the Commission pursuant to §230.45(1)(c), Stats. (1977).

2. The burden of proof is on the appellant.

3. The issues for hearing are as set forth in the appellant's bill of particulars, see Finding #20.

4. The transaction which resulted in the move of the appellant from his position with the TIME program to his position at the Training Academy was a transfer.

5. The transfer was in violation of §230.29, Stats., and void because it was not authorized by the administrator.

6. Issues with respect to the need for an additional training officer position at the training academy or the location of that position at the academy as opposed to Madison are issues of program management and are not subject to review by the Commission.

7. The respondent did not err in selecting the appellant for transfer instead of an employe (Mr. LaBlonde) with less seniority.

8. The appellant's transfer was neither a disciplinary action nor disciplinary in nature.

9. The reinstatement of appellant to his former position is not an appropriate remedy.

10. The payment of lost salary caused by the appellant's medical

leave is not an appropriate remedy.

11. The restoration of appellant's sick leave account for the days he used prior to his medical leave is an appropriate remedy.

12. It is an appropriate remedy that the respondent proceed forthwith either to take action to effectuate the transfer of the appellant to the Training Academy in accordance with the requirements of Subchapter II of Chapter 230, Stats., or to take such other lawful action that would resolve the current ambiguity of appellant's status.

OPINION

The key question on this appeal is whether the transaction in question, which resulted in the movement of the appellant from work with the TIME program to work at the State Patrol Academy constitutes in legal effect a transfer.

Section 230.29, Stats. (1977), provides:

> "A transfer may be made from one position to another only if specifically authorized by the administrator."

Section Pers. 15.01, Wis. Adm. Code, provides:

> "A transfer is the movement of an employe with permanent status in class from one position to a vacant position allocated to a class having the same pay rate or pay range maximum and for which the employe meets the qualification requirements."

Section 230.03(11), Stats. (1977), provides in part:

> "'Position' means a group of duties and responsibilities ... which require the services of an employe on a part-time or full-time basis."

See also § Pers. 1.02(8), Wis. Adm. Code.

One key element required for a transfer is a movement of an employe from one position to another position. The parties discussed two circuit court cases which dealt with the issue of whether transfers

had occurred with respect to the transactions in question. See Alexander v. Wis. State Personnel Board, case no. 139-490 (9/13/73), and Voight v. Wis. State Personnel Board, case no. 145-300 (5/5/75).

In both cases the courts looked to some extent to the duties and responsibilities before and after the transaction to determine whether there had been a change in position.

In Alexander there had been a change in location (from Chicago to Hudson). The court held that the concept of a position had to do with the "character" rather than the location of the job, and that since the appellant was to have done substantially the same kind of work at Hudson as he had been doing in Chicago, there was no change of position and no transfer.

In Voight, the employe's geographic location was not changed but his duties were changed from primarily those of a hearing examiner to the job of reviewing opinions before issuance to ascertain consistency with prior opinions, rendering legal advice to certain DNR employes, and working on the updating of statutes. The court held at pages seven and ten:

> "The Secretary contends that he merely reassigned duties to Van Sustern and did not 'transfer' him to a new position. The Court is of the opinion that a comparison of Van Sustern's duties in his position as hearing examiner ... and his duties as chief of the Research Section ... afford a rational basis for the Board's holding ....
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> * * *
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> ... when the Secretary not only assigned additional duties to him in his assignment as chief of the Research Section, but withdrew from him his principal activity of conducting hearings, a situation was created which afforded the basis for both the Director and the Board finding that a transfer

within the meaning of Wis. Adm. Code, Pers. 15.01, had occurred."

In the Commission's opinion, it is not necessary in order to have a transfer from one position to another under the statutes and administrative code rules that there be different kinds of duties and responsibilities before and after the transaction. In the circuit court cases discussed above, the Personnel Board and the courts on review found that it was useful to make this comparison to attempt to resolve ambiguity about whether, under particular circumstances, there were two different positions. These cases involved what undoubtedly were relatively complicated transactions compared to more routine personnel transactions. Also, §16.02(9), the predecessor statute to §230.03(11), was not effective until June 29, 1974. See Laws of 1973, Chapter 333, §6. This was before the date of the circuit court's decision in the Voight case, but after the date of the transfer and the director's decision which was the subject of the Personnel Board appeal. The provision was not mentioned by the court. However, just as the definition of a transfer does not hinge on a geographical move,[1] the language of the relevant rules does not require that the two positions involved in a transfer involve different kinds of duties and responsibilities.

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[1] The appellant argues that the Personnel Commission's decision in Kennel et al v. DOT, case nos. 78-263, 265, 266-PC (2/15/79), stands for a very liberal interpretation of the definition of "transfer." While that decision did refer to the personnel transactions in question as transfers, it is significant that in that case no issue was raised as to the appropriate categorization of the transactions. There were repeated and unchallenged references in the record to the transactions as transfers. For these reasons, the decision has very little precedential value with regard to the question of what constitutes a transfer.

Section Pers. 15.01 defines a transfer as the movement of an employe "from one position to a vacant position allocated to a class having the same pay rate or pay range maximum and for which the employe meets the qualification requirements." This certainly does not prohibit transfers between positions in the same class or between positions having the same kinds of duties and responsibilities. A "position" is defined by §Pers. 1.02(8) as a "group of duties and responsibilities which require the services of an employe ...." There also is nothing in this definition which requires that a move must be between two positions having different kinds of duties and responsibilities before it could be categorized as a transfer.

For example, a move by an employe from a Typist 2 position with the Division of Health to a Typist 2 position with the Division of Corrections would be a transfer despite the fact that the nature of the duties and responsibilities of the two positions might be exactly the same.

However, in particular cases where it is ambiguous whether there are two different positions involved in a transaction, it may well be useful, although not necessarily determinative, to compare the duties and responsibilities before and after the move.

In the instant case, the scenario that preceded the transaction was summarized succinctly in a memo dated April 20, 1978, from Larry J. Quamme, Director, Crime Information Bureau, Department of Justice, to Robert Bennett, Chief, Police Communications, DOT Division of Enforcement and Inspection (Appellant's Exhibit 6):

"In 1972, the Departments of Administration, Justice and Transportation working in concert developed and implemented the Wisconsin TIME System ... to accomplish this in an effective matter, the old WLETS was discontinued and TIME was created ... Field training for the WLETS terminals was provided by Mr. LaBlonde and Mr. Stasny of DOT. When the TIME System was implemented they joined three individuals employed by the Crime Information Bureau and the Team of five people began providing technical assistance to local agencies.

* * *

Prior to 1978, each training person attempted to establish classroom type participation within terminal agencies for operators and training assistance was provided by traveling to each agency on a routine basis. During 1977, the Crime Information Bureau proposed a more formal type of training program ....

* * *

In view of this type of training, it is our decision to change the emphasis, as to this point the participation of local agencies in sending terminal operators to the classes has been overwhelming. We can discontinue routine stops as each law enforcement agency in lieu of this type of regionalized training which is more cost effective, program beneficial and overall more successful than our previous endeavors.

* * *

In view of this, we really do not have any full time assignment for Mr. Stasny. At the maximum he would only teach 10 days in a year. There is just no need or justification to have him continue to travel from agency to agency in the 16 counties. The agencies are enrolling their personnel in the schools and the training needs will be accomplished as such."

The DOT decision was formalized in a letter dated May 17, 1978, from William Harvey, Administrator, Division of Enforcement and Inspection, to Larry Quamme (Appellant's Exhibit 3, p. 2):

"Effective May 22, 1978, Mr. Stasny's services will no longer be available to assist you as a Dept. of Transportation field representative involving the TIME System.

His past role and assitance in this regard is now deemed no longer necessary or justifiable. Instead we have determined

> there presently exists a greater need for his position classification services solely within our Division operations.
>
> Therefore this letter, in effect, dissolves the long standing agreement between our departments concerning John's direct daily training assistance, etc., involving the TIME System."

The appellant's first assignment at the Training Academy was to develop a communications training program for local law-enforcement agencies.[2] Once the decision to shift the TIME training approach from individual local agency contacts to regionalized, classroom type training was effected, the group of duties and responsibilities associated with appellant's job essentially was eliminated. The respondent did not move the appellant's position from the TIME program to the Training Academy; the former group of duties and responsibilities was in essence eliminated and the appellant was transferred to a different group of duties and responsibilities at the Training Academy. While the respondent argues that the "fundamental nature of the [appellant's] job had not changed," this argument lacks force given the statutory definition of "position." There does not have to be a move between classifications as a prerequisite to a transfer.

The appellant has raised a number of grounds of error with respect to this transaction. Before taking these up, it is necessary to address the respondent's contention that some of these points are outside the

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[2]Although the appellant initially spent a substantial part of his time on clerical duties associated with lower level classifications, the Commission does not perceive this as significant in light of the temporary nature of these assignments and the fact that the appellant only was at the Academy for approximately 30 days before going on medical leave.

scope of the hearing as they had not been raised during the grievance procedure.

The issue presented for hearing was set forth in a letter to the parties dated January 12, 1979 from the hearing examiner:

> "...whether the Respondent should be sustained in its determination of Appellant's grievance at the third step, with this general issue argumented [sic] by the Appellant's Bill of Particulars filed January 2, 1979."

The respondent had objected to issues numbered 1 and 4 set forth in the bill of particulars (see Finding 20) on the ground that they had not been raised during the grievance procedure. The hearing examiner indicated in his January 12, 1979, letter that the decision on these objections would be deferred until after the hearing on the merits.

In the opinion of the Commission, so long as the appellant objected to the transfer in the course of his grievance proceedings, it was not necessary for him to have specifically raised all the potential grounds for error as set forth in the bill of particulars during those proceedings. As the appellant notes in his reply brief, there are no provisions for discovery for parties to the unilateral grievance procedure and it is not reasonable to require an employe at the point of filing his grievance to present all of the legal theories which might support his grievance.

The respondent also objects to certain of appellant's grounds of error or issues set forth in his brief on the theory that they were not even raised in the bill of particulars and therefore were not noticed for hearing.

The first objection is to the ground that the transfer was not approved by the appointing authority. The bill of particulars contains in part the following:

> "The appellant contends that his transfer ... was illegal, arbitrary, and an abuse of discretion for the following reasons:
> (1) It was not properly approved in accordance with Sec. 230.15(3) and 230.29, Stats."

In his reply brief, the appellant addresses respondent's objection on this point as follows:

> "Similarly, Respondent's argument that the question of whether the transfer was approved by the appointing authority was not raised in our Bill of Particulars is without foundation. At Item (1) of our Bill of Particulars we specifically stated that '(1) It [the transfer] was not properly approved in accordance with sec. 230.15(3) and 230.29, Stats.' Section 230.15, Wis. Stats., clearly states that:
>
> '(3) No person shall be appointed, transferred, removed, reinstated, restored, promoted or reduced in the classified service in any manner or by any means, except as provided in this subchapter.' (Emphasis added)
>
> It is, therefore, quite clear that this issue was raised by the Bill of Particulars and is properly before the Commission for decision." p. 6.

However, since §230.15(3) is a general provision while §230.29 provides that "A transfer may be made from one position to another position only if specifically authorized by the administrator," the Commission cannot agree. If this matter had been noticed for hearing on the basis of a general assertion that the transfer was illegal or had not been effected in accordance with required procedures under the civil service statutes and rules, arguably the respondent would have to be prepared to defend as to any and all grounds of alleged illegality. However, the citation in conjunction of §§230.15(3) and 230.29, Stats.

makes it reasonable for the respondent to presume that the failure to act "as provided in this subchapter" refers to the failure to obtain the approval of the administrator.

This approach is reinforced by the content of appellant's argument on the merits with respect to this issue. See appellant's brief, page 23:

> "Section 230.06(1), Wis. Stats. clearly provides that the assignment of the duties to individual employe are to be done by 'appointing authorities.' ... a major shift in the duties of an employe, such as those involved in a transfer, would have to be authorized by the Secretary of Transportation."

Section 230.06(1) provides in part: "An appointing authority shall ... assign their duties ...." This provision does not by its terms refer to "approval" or "authorization," although authorization or approval of a transaction by an appointing authority may be sufficient involvement to constitute compliance in a particular case. This would make it even more difficult for the respondent to know that the language of the bill of particulars ("was not properly approved in accordance with sec. 230.15(3) and 230.29, Stats.") was meant to refer to a violation of §230.06(1).

For these reasons the Commission is of the opinion that the ground of error that the appointing authority did not approve or authorize the transfer is outside the scope of the hearing notice and will not be considered.

The respondent also objects to the ground of error that the agency failed to provide written reasons for what was actually a disciplinary action. The bill of particulars does include this statement:

> "(4) The underlying motivation for this transfer was disciplinary but was stated to be a reduction in force because a disciplinary action could not be sustained."

What is involved here, at least in part, is an allegation that what was in effect a disciplinary action was handled as a non-disciplinary personnel transaction to avoid a probable cause requirement. The appellant has argued that this alleged disciplinary action is subject to the notice requirements of §Pers. 23.01, Wis. Adm. Code. Inherent in allegation (4) in the bill of particulars is the theory that the respondent did not take formal disciplinary action, which would include the provision of notice, with respect to the appellant. In the Commission's opinion, there is sufficient connection between this ground and item (4) in the bill of particulars to provide adequate notice.

Finally, the respondent objects to the ground of error reflected in the statement of issue set forth in the appellant's brief at page 2:

> "Was the transfer of John R. Stasny from his position as TIME Field Representative to the position at Fort McCoy the result of an unfair or incorrect interpretation or application of the Civil Service statutes or administrative rules?"

In his bill of particulars the appellant stated, in part:

> "The Appellant contends that his transfer ... was illegal, arbitrary, and an abuse of discretion for the following reasons: ...." (Emphasis added)

This general statement, followed by the specific enumeration of grounds of error or reasons, limits the hearing to what reasonably can be included within the five reasons or grounds. In the Commission's opinion, the issue quoted above is not so included.[3]

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[3] In Kennel et al v. DOT, case no. 78-263, 265, 266-PC (2/15/79), the Commission ruled on the issue "whether the Department of Transportation, through incorrect interpretation or unfair application, has violated the Civil Service Statute or Administrative Rule." However, that was the exact issue that was noticed for hearing and that had been proposed by the respondent.

The Commission will now address the substantive issues remaining in the case.

The appellant argues that the transfer is void because it was not approved by the administrator of the Division of Personnel as required by §230.29, Stats., and §Pers. 15.03, Wis. Adm. Code. There is no dispute that there was no such approval. The respondent's position rests on the theory that no transfer occurred. The Commission having determined that there was a transfer, it follows that the respondent erred by not obtaining the approval of the administrator. The only question is whether the error voids the transaction. This in turn depends on whether the requirements of §230.29, Stats., are considered mandatory or directory.

In the opinion of the Commission the provisions of §230.29, Stats., are mandatory. See Karow v. Milwaukee County Civil Service Comm., 82 Wis. 2d 565, 570-571, 263 N.W. 2d 214 (1978):

> "The general rule is that the word 'shall' is presumed mandatory when it appears in a statute. Scanlon v. Menasha, 16 Wis. 2d 437, 443, 114 N.W. 2d 791 (1962).
>
> * * *
>
> However, the word 'shall' can be construed as directory if necessary to carry out the legislature's clear intent. Wauwatosa v. Milwaukee County, 22 Wis. 2d 184, 191, 125 N.W. 2d 386 (1963)."

The Commission can not discern any legislative intent that would be served by a directory interpretation of the requirement of approval of transfers by the administrator. It is significant that this requirement is the only procedural step imposed by the legislature with respect to transfers. It is also significant that §230.15(3), Stats. (1977),

provides:

> "No person shall be appointed, transferred, removed, reinstated, restored, promoted or reduced in the classified service in any manner or by any means, except as provided in this subchapter." (Emphasis supplied)

This subsection is an indication of legislative intent that these transactions can not be effected without literal compliance with the statutory requirements.

Failure of compliance with the mandatory statute must void the transaction, see Muskego-Norway C.S.J.S.D. No. 9 v. WERB, 32 Wis. 2d 478, 483 (1967); 82 C.J.S. Statutes §374. In light of this it is not strictly necessary to address all the other substantive issues raised by the appellant which are properly before the Commission. However, since these points were the subject of hearing and briefs, and to do so possibly may effect some future economy, the Commission will address these points.

The appellant's second item in the bill of particulars is:

> (2) There was no need for an additional Training Officer position at Fort McCoy and the Appellant has been forced to perform duties totally unrelated to his job classification;

As to the first argument, the Commission held in the Kennel case that it would not scrutinize the agency's analysis of its operational needs nor its determination how to allocate its positions to meet those needs.and that approach will be followed here.

As to the second argument, in light of the facts that the appellant had just been assigned to the academy and had only been there a short period before commencing medical leave, the assignment of some duties outside of his classification does not render the transfer illegal,

arbitrary, or an abuse of discretion.

The third item in appellant's bill of particulars is:

> "(3) The Appellant was involuntarily removed from his position in Madison and reassigned to the Training Academy at Fort McCoy even though he had more seniority/ longevity than another employe having substantially the same duties and responsibilities when the stated reason for this personnel action was the need for a reduction in staff in Madison;"

The appellant makes it clear in his reply brief that he is not arguing that the respondent should have followed formal layoff procedures. Rather, he is arguing that the respondent should have considered his seniority in determining who would be transferred from Madison.

The other employe in question, Mr. LaBlonde, was employed in the Bureau of Systems and Data Processing and had a wider range of duties than the appellant. It was not inappropriate for the respondent to have chosen the appellant rather than Mr. LaBlonde for transfer.

The appellant's fourth item in his bill of particulars is:

> "(4) The underlying motivation for this transfer was disciplinary but was stated to be a reduction in force because a disciplinary action in this situation could not have been sustained;"

This transaction was not an improper disciplinary action as alleged by appellant. The transaction does not fall within the enumeration of disciplinary matters set forth in §230.34, Stats. (1977). The appellant alleges in his brief that "it was the perceived inadequacies in Mr. Stasny's job performance which were the basic underlying motive for the transfer decision." Even if that were found as a fact, which it was not, this would not be a basis for a conclusion that the transfer constituted a disciplinary transaction or had disciplinary motivations.

"(5) The duties performed by the Appellant while assigned the Training Academy at Fort McCoy could as easily have been performed in Madison."

This raises a question of program management which is subject to the same restriction on review as was the case with the first part of item (2): "There was no need for an additional Training Officer position at Fort McCoy." At any rate, it was not inappropriate to base this Training Officer position at the Training Academy.

The question of remedy presents some difficulty. The appellant in his brief requests reinstatement to his position as a TIME field representative. Since his position has been eliminated, the Commission does not believe that this would be possible.

He also requests that he be paid "all pay lost as a result of the transfer and the medical leave which was proximately caused by that transfer less any applicable wage continuation benefits and by directing that Mr. Stasny's sick leave account be reimbursed for the days used prior to the disability leave."

The appellant did introduce uncontroverted medical evidence that the transfer exacerbated his medical problems to the point that he had to take medical leave. Section 230.43(4), Stats. (1977), provides in part:

"If an employe has been removed, demoted, or reclassified, from or in any position or employment in contravention or violation of this subchapter, and has been reinstated to such position or employment by order of the commission or any court upon review, the employe shall be entitled to compensation therefor from the date of such unlawful removal, demotion or reclassification at the rate to which he or she would have been entitled by law but for such unlawful removal, demotion or reclassification."

Removal is a form of discipline, see §230.34(1)(a), Stats. (1977), and a transfer does not fall within the other categories of transactions

set forth in §230.43(4). This is the only civil service statute which provides for retroactive pay, and it has been held to limit back pay to those situations enumerated. See Van Laanen v. Knoll, Wis. Pers. Bd. No. 74-17, affirmed, Van Laanen v. State Personnel Board, No. 153-348, Dane County Circuit Court (5/31/77).

Chapter 196, Laws of 1977, which created the Personnel Commission as the successor to the Personnel Board, provided the Commission with additional powers following appeal hearings. Whereas the Board could only affirm or reject, the appealed action, see §16.05(1)(f), Stats. (1975), the Commission can affirm, modify or reject, see §230.44 (4)(c), Stats. (1977). The Commission has held that this provides the authority to modify a reclassification denial to provide an appropriate effective date prior to the date of the Commission Order, and accordingly to award back pay, see Doll v. DP, case no. 78-110-PC (6/29/79).

However, this is not an appeal under §230.44, Stats., and in any event the remedies that appellant seeks with respect to his medical leave status can not be accomplished by a modification of the appealed transfer action. Therefore, in this case the Commission does not believe back pay is a permissible remedy.

Since the Commission has found that the transfer was the cause of appellant's medical difficulties, and to do so would not involve a back pay award, the restoration of sick leave used subsequent to the transfer, and prior to the commencement of medical leave, is appropriate.

In the opinion of the Commission the respondent should forthwith either take action to effectuate the transfer of the appellant to the

Training Academy in accordance with the requirements of Subchapter II of Chapter 230, Stats. (1977), or to take such other action, for example, a transfer to another position, that would resolve the current ambiguity of appellant's status.

ORDER

The respondent's action transferring the appellant from his position with the TIME program to the Fort McCoy Training Academy is rejected and this matter is remanded for action in accordance with this decision.

Dated: Oct 12, 1979. STATE PERSONNEL COMMISSION

Joseph W. Riley
Chairperson

Charlotte M. Higbee
Commissioner

EDD:AJT:jmg

6/30/79