STATE OF WISCONSIN	PERSONNEL COMMISSION
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	*
BRIAN KETTERHAGEN,	*
	*
Appellant,	*

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RULING ON MOTION TO DISMISS

This case was initiated as an appeal pursuant to \$230.44(1)(c), stats., of a suspension without pay for three days. Pursuant to a prehearing conference report dated October 18, 1990, a hearing on the question of just cause for the suspension was scheduled for December 4, 1990, and subsequently appellant advised he intended to pursue an issue with respect to an alleged constructive demotion. On November 6, 1990, respondent filed a motion to dismiss for lack of subject matter jurisdiction, and both parties have filed briefs.

The underlying facts essential to deciding this motion do not appear to be in dispute. Effective October 8, 1989, appellant promoted from a Police Officer 2 position at UW-Parkside in which he had permanent status in class, to a Campus Police Supervisor 1 position at UW-Parkside, in which he was required to serve a one year probationary period pursuant to §ER-Pers 13.02(5), Wis. Adm. Code. He was suspended without pay effective July 10-12, 1990. Prior to the completion of the aforesaid probationary period, appellant requested and was granted a voluntary demotion to his previous Police Officer 2 position, effective July 15, 1990.

Appellant now alleges that "he was coerced by his employer to submit a request for demotion, the alternative being a risk of the loss of his job which he needed to support himself and his family, as well as the loss of outside part-time employment. Therefore, the circumstances were tantamount to a constructive demotion." (Brief in opposition to motion, pp 2-3.)

Section 230.44(1)(c), stats., provides that suspensions or demotions may be appealed if the employe has permanent status in class. At the time of the demotion, appellant did not have permanent status in class as a Campus Police Supervisor 1. However, §230.28(1)(d), stats., provides that a "promotion . . . within

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President, UNIVERSITY OF WISCONSIN SYSTEM (Parkside),

Respondent.

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an agency shall not affect the permanent status in class and rights, previously acquired by an employe within such agency." Furthermore, §ER Pers 14.03, Wis. Adm. Code, provides in part as follows:

(1) PROMOTION WITHIN THE SAME AGENCY. In accordance with \$230.28(1), stats., the promoted employe shall be required to serve a probationary period. At any time during this period the appointing authority may remove the employe from the position to which the employe was promoted without the right of appeal and shall restore the employe to the employe's former position or a similar position and former rate of pay . . . Any other removal, suspension without pay, or discharge during the probationary period shall be subject to \$230.44(1)(c). stats. (emphasis added)

Based on the foregoing provisions, it is clear that at the time of his suspension, appellant had the right to appeal that transaction under §230.44(1)(c), stats. However, the Commission does not agree with appellant that his permanent status in class derived from his Police Officer 2 position provides a basis for appeal of the constructive demotion. Pursuant to §ER Pers 14.03, the Wis. Adm. Code, respondent could have removed appellant from the Campus Police Supervisor 1 position and restored him to the Police Officer 2 position "without the right of appeal." If appellant had no right to appeal this action if it were done overtly, his right to appeal is not enhanced by labeling it a <u>constructive</u> demotion, where the employer allegedly coerced him into doing something which the employer in any event had the right to have effectuated without recourse by him.

ORDER

So much of this matter as constitutes an appeal of respondent's removal of appellant from the Campus Police Supervisor 1 position is dismissed for lack of subject matter jurisdiction. This matter is to proceed to hearing on the issue regarding the three day suspension as set forth in the conference report dated October 18, 1990.

Dated: 100ember 21, 1990 STATE PERSONNEL COMMISSION IIM AURIE R. McCALLUM, Chairperson AJT/gdt/2 GERALD F. HODDINOTT, Commissioner