STATE OF WISCONSIN PERSONNEL COMMISSION

MARGARET E. DAVIS,

Appellant,

v.

Executive Director, EDUCATIONAL COMMUNICATIONS BOARD,

Respondent.

Case No. 91-0214-PC

INTERIM DECISION AND ORDER

This matter is before the Commission following the promulgation of a proposed decision and order (a copy of which is attached) by a hearing examiner pursuant to §227.46(2), Stats., and consideration of the parties' objections and arguments with respect to the proposed decision.

Respondent reiterates its objections to this agency's subject matter jurisdiction over an alleged constructive demotion. The Commission already addressed this issue in its May 14, 1992, ruling on respondent's initial motion to dismiss on this ground, and its June 12, 1992, ruling on respondent's motion for reconsideration. Respondent has not adduced any new authority or arguments on this issue, and the Commission declines to change its earlier conclusion that it has subject matter jurisdiction.

Respondent stresses that what occurred here does not meet the definition of a demotion -- i.e., "the permanent appointment of an employe with permanent status in one class to a position in a lower class." §ER1.02(8), Wis. Adm. Code. As the Commission observed previously, this type of argument is of course true of any transaction which has legal recognition on a constructive basis, see BLACK'S LAW DICTIONARY 283 (5th ED, 1979):

> Constructive. That which is established by the mind of the law in its act of construing facts, conduct, circumstances, or instruments. That which has not the character assigned to it in its own essential nature, but acquires such character in consequence of the way in which it is regarded by a rule or policy of law; hence, inferred, implied, or made out by legal interpretation.

The Commission's conclusion that it has subject matter jurisdiction under §230.44(1)(c), Stats., over an alleged constructive demotion, is based on large part on the Supreme Court's opinion in Watkins v. Milwaukee County Civil Service Comm., 88 Wis. 2d 411, 276, N.W. 2d 775 (1979). In that case, it was clear that the employe had resigned his employment with Milwaukee County, yet the Court held that the transaction could be considered a discharge for purposes of the county civil service code, §63.10, Stats., when the employe alleged that the resignation had been coerced by his employer. To the extent that respondent is arguing that the instant case is distinguishable because the state administrative code has a specific definition at §ER 1.02(8) of "demotion," the Commission disagrees. In Watkins, the employer unsuccessfully made essentially the same kind of argument:

> Petitioner [employe] urges the court to construe coerced resignations as a form of discharge, which would invoke the procedural mechanisms of sec. 63.10, Stats. Respondents argue that the provisions of sec. 63.10 apply only where charges are filed, and that charges are not required to be filed where, as here, the employee resigned. 88 Wis. 2d at 420.

It was just as clear in Watkins that from a literal standpoint there had been no discharge, as it is in this case that from a literal standpoint there has been no demotion.

In the Commission's opinion, the Court's rationale in Watkins for treating a coerced resignation as a constructive discharge applies as well to the jurisdictional question presented in the instant case. The Watkins decision contains the following:

> Resignation obtained by coercion poses serious possibilities of abuse. "[A] separation by reason of a *coerced* resignation is, in substance, a discharge effected by adverse action of the employing agency." (Emphasis in original.) *Dabney v. Freeman*, 358 F.2d 533, 535 (D. C. Cir. 1966). Treating coerced resignations as discharges for purposes of hearings under sec. 63.10, Stats., fits well with the policies of security of tenure and impartial evaluation which underlie the civil service system. The strength of this policy is underscored by the language of sec. 63.04, Stats., which provides that "no person shall be . . . removed from the classified service in any such county [which has adopted the civil service system], except in accordance with the provisions of said sections [secs. 63.01 to 63.16, inclusive]." id. (brackets in original)

Similarly, actions taken by an agency for essentially disciplinary reasons to strip a position of significant responsibilities to the point where it has been restructured into an essentially new position that is at a lower level from a classification standpoint also pose serious possibilities of abuse. This is illustrated by Juech v. Weaver, Wis. Pers. Bd. (1/13/72). In that case, the employing agency was dissatisfied with the performance of a Maintenance Operations Foreman, and relieved him of his supervisory duties and assigned him maintenance mechanic duties. Ultimately, his position was reclassified to Maintenance Mechanic 1. The Board held that while this transaction had been denominated a reclassification, it was in effect a demotion, and the appeal was actually an appeal of a demotion rather than a reclassification. While this was a case where the employe actually had received a notice of reclassification, the Commission does not perceive the official reclassification as a prerequisite to the existence of a constructive demotion.

Initially, respondent's contention that Cohen v. DHSS, 84-0072-PC, 85-0214-PC, 86-0031-PC, 84-0094-PC (2/5/87), requires an actual change in classification as an element of a constructive demotion is incorrect. In that case, the employe had been moved from one position to another, both in the same classification. The Commission held:

> Here, the appellant's BSSDI position was apparently classified at the Human Services Administrator 3 (HSA 3) level and his HMO Project Director position was also classified at the HSA 3 level. The focus of the appellant's first three cases will be on whether appellant's HMO Project Director position was misclassified. In order to establish that the appellant was constructively demoted, the Commission will have to find that the HMO Project Director position should have been at a lower classification than HSA 3. That decision must be based on an analysis of the duties assigned to the position, the relevant class specifications, the classification factors and comparable positions. (slip opinion, p. 8)

If an employing agency, acting with disciplinary motivation, were able to strip a position of duties and responsibilities to the extent of a de facto reduction in class level, but the employe had no recourse to appeal until the downward movement in classification were recognized by a de jure personnel transaction, this would still leave a significant potential for abuse of the civil service system. An employe in such a situation, while not reduced in salary or

class level, would in effect be waiting for the "ax to fall" while unable to challenge the agency action. As was mentioned in the Commission's June 12, 1992, ruling on respondent's motion for reconsideration, in order to establish a constructive demotion an employe has the burden of showing "the employer intended to cause a reduction in the classification level of the employe's position, thereby effectively disciplining the employe. If the employe has to wait until the effectuation of the downward classification movement, which could involve an extended period, before taking an appeal, the delay could substantially hamper his or her ability to establish the requisite intent." p. 2.

In many cases, it may be difficult to establish that a position has been lowered in effective class level prior to any formal classification change. However, this is the employe's burden. In the instant case, the lower class level of the reconfigured position was clearly established, not only by the testimony of appellant's expert, but also by the virtual admission by respondent's management, see proposed decision, Finding of Fact #13, p. 5.[1]

Respondent also argues with respect to the timeliness of the appeal that there should not be a requirement of written notice to start the limitations period, since because this case involves a constructive personnel transaction, there will never be written notice thereof and there will never be a limit on the time for appeal. However, the proposed decision does not hold that the employer must provide written notice of the constructive demotion per se.[2] Rather, the proposed decision relies on the specific statutory provision at §230.09(2)(c), that: "[i]n all cases, appointing authorities shall give written notice to the ... employe of changes in the assignment of duties or responsibilities to a position when the changes in assignment may affect the classification of the position." In the instant case, the only written notice of these changes referred to an effective date of October 1, 1991. A central element of a constructive demotion is the change in a position's duties and responsibilities to those associated with a lower class level. Therefore,

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[1] Respondent contends that it was not established that there was at least a 50% change in the position. To the extent that such a finding is necessary to the finding that a new position has been created, it is noted that Ms. Miller, appellant's expert, so testified (see p. 8, proposed decision), and the Commission would so find.

[2] E.g., the employer is not required to provide written notice such as "The agency intends to constructively demote you effective October 1, 1991."

appellant did not have effective notice of the constructive demotion until she received written notice of the changes in her position with an effective date of October 1, 1991.

ORDER

The proposed decision and order, a copy of which is attached hereto and incorporated by reference, is adopted as the Commission's final disposition of this matter.

Dated: June 21, 1994 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

AJT:rcr

Parties:

Margaret Davis
2146 Fox Avenue
Madison, WI 53711

Glenn A. Davison
Executive Director, ECB
3319 W. Beltline Hwy.
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NOTICE
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

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

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

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

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

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

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

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

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MARGARET E. DAVIS,

Appellant,

v.

Executive Director, EDUCATIONAL COMMUNICATIONS BOARD,

Respondent.

Case No. 91-0214-PC

PROPOSED DECISION AND ORDER

NATURE OF THE CASE

This case is an appeal pursuant to §230.44(1)(c), Stats., of an alleged constructive demotion. The parties stipulated to the following issues at a prehearing conference:

1. Whether respondent constructively disciplinarily demoted appellant without just case.

2. Whether respondent constructively demoted appellant in lieu of layoff without just cause.

3. If liability exists, what are the damages?

Following the presentation of appellant's case at a hearing on the merits, respondent filed a motion to dismiss, and the parties have filed briefs.

FINDINGS OF FACT

1. Appellant commenced employment with respondent in 1975 as a limited term employe (LTE). In 1978 she was appointed to a permanent Public Information 1 (PIO 1) position in the classified civil service. This position was reclassified to PIO 2. In January 1985, she took a leave of absence and returned in August 1985 to a one-half time permanent classified Administrative Assistant 3 (AA 3) position, which subsequently was changed to three-quarters time.

2. The duties and responsibilities of appellant's position after her return to work in 1985 were essentially accurately described in a position

description (PD) she signed November 13, 1985 (Appellant's Exhibit 15), which contains the following goals: "70% A. Planning and preparation of monthly Radio Guide to promote the programming of Wisconsin Public Radio ... 30% B. Initiating, developing and implementing promotional campaigns that promote the programming on Wisconsin Public Radio." Appellant operated under the very general supervision of Bill Estes.

3. In 1989, following a reorganization, her position came under the supervision of Jack Mitchell, administrator of the ECB Radio Division. However, she was supervised in practice by Monika Petkus, the chairperson of the promotion committee, and an academic staff member with the UW-Extension.

4. Ms. Petkus took a much more active role in appellant's supervision than had Mr. Estes. She exercised more control over the details of appellant's work and allowed appellant to exercise less independent responsibility. Ms. Petkus also essentially assumed responsibility for the oversight and direction of the work of the ECB graphic artist, a role that appellant previously had exercised. A PD appellant signed on March 16, 1990 (Appellant's Exhibit 14) reflected various changes in her duties and responsibilities that had occurred. This PD contained the following "position summary:"

> Provide statewide promotion of the programming on Wisconsin Public Radio through print publications, acting as an information clearinghouse for regional program staff and preparing/distributing support print materials. Implement promotional activities under direction of Network Promotions Committee and in cooperation with other promotional members, graphic artists and programming staff.

As a result of these changes, appellant's control over the content of the radio guide was substantially reduced. She was implementing committee decisions in this area, decisions into which she had little, if any, input.

5. In early fall of 1990, the graphic artist with respect to whom appellant previously had exercised direction was transferred out of the radio division to the television division.

6. In November 1990, appellant told Ms. Petkus that she felt that she was just like a technician, typesetting material that Ms. Petkus wrote. Ms.

Petkus said that if appellant did not take on more responsibility, that's all she would ever be -- a technician.

7. On February 25, 1991, Ms. Petkus informed appellant that due to budget cuts, her position would be reduced from 75% to 50% time, that a new publicity person would be hired, on either a three-quarters or full-time basis, using WHA or university funds, and that part of this person's responsibility would be to publish a regional newsletter. Appellant previously had expressed an interest in this assignment when it had been discussed, but Ms. Petkus said that Mr. Mitchell had decided the assignment would fit better in the newly-created position rather than being given to appellant. Ms. Petkus did not say when these changes would occur.

8. In response to inquiries by appellant about her status, Mr. Mitchell advised her by a memo dated April 3, 1991 (Respondent's Exhibit K) which included the following:

> I explained that we are under budget pressure and <u>something</u> is going to have [to] be adjusted next year. It is also a fact that we need to do something more permanent in terms of staffing in the promotion area. Monika could not have told you that "a new permanent position has been created which will perform functions within the scope of (your) position description" because we so far have done nothing but talk about options. Out of courtesy, Monika gave you early warning that one <u>possibility</u> would be to take your job back down to 50%, which is what the job has been through most of your tenure in it.
>
> It is clear that we cannot afford 1.75 FTEs in this area, but we do not know how it will shake down. In sorting this out, we need to take into consideration your strengths and interests and the fact that the program guide will be a much less frequent publication than it once was. Your strength is in print: we also have a need in "events" and "promotion," which may or may not suit you well.
>
> I told you that nothing is settled. We are aware of your concerns and will give them full consideration. I hope that our plans will be completed by the end of April. I assured you that we would give you three months notice of any change. This means an April 30 decision would not happen until August 1. In light of your child care situation, I am willing to guarantee no change until September 1.

9. By memo dated June 14, 1991, to Larry Dokken, Director of the Bureau of General Services in ECB (Respondent's Exhibit O), Ms. Petkus forwarded "a copy of Peg Davis' new job description, which becomes effective October 1, 1991." The attached PD included the following general goal

statement: "Serve as publications/print member of promotion team. Propose ideas for publication's content. Apply research/marketing information to publications, carry out marketing objectives through flyers, posters, radio grids, radio guide, and other print pieces." This PD accurately reflected appellant's position as it existed in May 1991.

10. An October 25, 1991, letter from Mr. Dokken to appellant (Respondent's Exhibit P), included the following:

> This correspondence is to confirm the reduction in hours of your position from .75 FTE to .50 FTE effective October 6, 1991. This will be reflected on your paycheck dated October 31, 1991.
>
> As indicated to you by your supervisor, Ms. Monika Petkus, this action is being taken due to the budgetary restraints of Wisconsin Public Radio. It also recognizes recent changes in your workload due to the reorganization of the promotions unit and the reformatting of the Radio Guide. It in know [sic] way reflects on your performance in the position.

11. During the latter part of 1991, a vacancy occurred in another AA 3 - Promotions and Publications - 50% position in ECB. This essentially was the work appellant had been doing before 1985. Appellant requested a transfer to this vacancy. Respondent denied her request for transfer and advised her that she would have to participate in the exam for this position, which she did. She was not offered the position.

12. Because appellant believed that due to the restructuring of her job it essentially was clerical in nature and no longer was at the AA 3 level, she resigned her employment with the ECB effective January 3, 1992, by a memo submitted December 13, 1991 (Appellant's Exhibit 7). She began employment at the University of Wisconsin School of Business effective May 4, 1992.

13. A June 26, 1991, memo from Mr. Dokken to Ted Tobie, Administrator, Administrative Services Division, ECB (Appellant's Exhibit 3), with respect to the changes in appellant's position, included the following:

> The scope of Peg's duties and responsibilities appears to have been reduced significantly.
>
> Peg's position was reclassified to the Administrative Assistant 3 (1-12) level based on her responsibility for the overall planning and coordination of Radio promotions as well as her role as editor of the Radio Guide.

> The new position description identifies Peg's position as part of a "promotions team" assisting in publicizing programming and special events. It would appear that the position has been reduced in responsibility and would probably be more appropriately classified as a Public Information Officer 2.
>
> This undoubtedly occurred when Monika was added to the promotions unit and reflects the problems inherent in the current organizational relationship. Since we normally do not know what specific duties are assigned to UW-Extension staff, it is nearly impossible to predict how changes on their side will affect our staff.
>
> Unless I hear otherwise, I will schedule an audit of Peg's position prior to October 1, 1991, and recommend the appropriate action.

14. A prior memo from Mr. Dokken to Mr. Tobie dated February 25, 1991 (Respondent's Exhibit J) included the following:

> One of our employees came into my office today very upset over the probability that her hours were going to be cut. Apparently Monika told Peg Davis that Jack Mitchell was considering cutting her hours back from .75 FTE to .50 FTE due to budget constraints.
>
> At the same time, WHA is apparently planning to hire a full time publicist (academic staff) to work in this unit. While I have not seen a job announcement or position description, it is likely that some of the duties performed by the new position would be considered within the normal scope of Peg Davis's duties. Recruitment for this position is planned to begin in March. Ms. Davis naturally feels that she is being pushed out the door.
>
> I have two points of concern:
>
> 1. Whether the new hire has been brought before the Executive Committee.
>
> 2. Whether the reduction in hours and new hire are really a way to encourage this employee to resign. As you know, there is a morale problem within the work unit. Since the exit interview with Vicki Pierce, I have spoken to Peg Davis and Peter Wallace about the work environment under Monika Petkus. Both of these employees echoed the same sentiments expressed by Vicki Pierce. There appears to be some serious concerns to address. As yet, I have not spoken to Jack Mitchell about them but feel impelled to do so soon considering this latest development.

15. As a result of the changes respondent made in appellant's position, which were in effect no later than May 1991, the position was changed to a different position than appellant occupied in 1985. This

reconstituted position corresponded to a PIO 2 classification, although no action had been taken to change its classification from AA 3 prior to the effective date of appellant's resignation.

16. In making the aforesaid changes in appellant's position, respondent was motivated by dissatisfaction with appellant's performance.

17. Appellant filed her appeal with this Commission on October 28, 1991.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter of this appeal pursuant to §230.44(1)(c), Stats.[1]

2. This appeal was timely filed.

3. Appellant has the burden of proof.

4. Respondent constructively disciplinarily demoted appellant without just cause.

5. Respondent constructively demoted appellant in lieu of layoff without just cause.

6. Appellant is not entitled to any remedy other than what amounts to a declaratory ruling.

OPINION

Before discussing the merits, the Commission will address respondent's motion to dismiss for untimely filing. The record reflects rather clearly that appellant's duties and responsibilities had actually been reduced no later than May 1991. Her appeal was filed October 28, 1991. Section 230.44(3), Stats., requires that appeals be filed "within 30 days after the effective date of the action, or within 30 days after the appellant is notified of the action, whichever is later."

Section 230.44(3) does not specify the nature of the notice to the employe of the transaction in question. The Commission has held that where the civil service code requires written notice to an employe of a personnel matter, verbal notice is not effective under §230.44(3) to commence the

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[1] The Commission determined in a ruling on respondent's motion to dismiss, dated May 14, 1992, that it had jurisdiction over appellant's allegations of constructive disciplinary demotion and constructive demotion in lieu of layoff.

running of the time for appeal, see, e.g., Piotrowski v. DER, 84-0010-PC (3/16/84). Section 230.09(2)(c), Stats., specifically provides, inter alia: "In all cases, appointing authorities shall give written notice to the secretary and employe of changes in the assignment of duties or responsibilities to a position when the changes in assignment may affect the classification of the position." (emphasis added) Based on this record, this requirement clearly applies to the changes that respondent effected in appellant's position. Therefore, respondent was required to provide written notice of these changes.

Based on the documents in this record, it must be concluded that management never provided any written notice of the changes in the duties and responsibilities in appellant's position that actually had occurred by the early part of 1991, except to the extent that the changes were referred to as having an effective date of October 1, 1991. The changes were never reflected in a formal position description. Management did show appellant a draft of a new PD in May and June of 1991. However, the record reflects that management represented that this position description would not be considered effective at that point, and not until October 1, 1991. For example, in a May 10, 1991, memo from Ms. Petkus to Mr. Dokken (Respondent's Exhibit L), she states:

> I have given Peg verbal notice of the change [of appellant's appointment from 75% to 50% time], as well as a copy of her current job description, which we hope to revise together before ... next week ... I'll forward a revised position description when discussions are complete. At this point, I anticipate reductions and/or changes in these categories....

In a May 14, 1991, memo from Ms. Petkus to appellant (Respondent's Exhibit M), Ms. Petkus states:

> Following up on our meeting this morning, I've drafted a proposed job description to become effective October 1st. It takes into account the various points we discussed and keeps the total time commitment to the 50 percent allotted in the budget.
>
> The job description is attached. Please look it over. I'd like to discuss it again before forwarding a copy ot Larry Dokken.

In a June 14, 1991, memo to Mr. Dokken from Ms. Petkus (Respondent's Exhibit O), she states: "Attached is a copy of Peg Davis' new job description, which

becomes effective October 1, 1991. Peg and I have discussed the description twice, and are in agreement about its contents." The October 25, 1991, memo to appellant from Mr. Dokken (Respondent's Exhibit P) includes the following:

> This correspondence is to confirm the reduction in hours of your position from .75 FTE to .50 FTE effective October 6, 1991. This will be reflected on your paycheck dated October 31, 1991.
>
> As indicated to you by your supervisor, Ms. Monika Petkus, this action is being taken due to the budgetary restraints of Wisconsin Public Radio. It also recognizes recent changes in your workload due to the reorganization of the promotions unit and the reformatting of the Radio Guide. It in know [sic] way reflects on your performance in the position.

Thus, while the changes in the duties and responsibilities of appellant's position were in place in the first half of 1991, the only written notice of these changes was a draft PD which respondent represented to appellant as not effective until October 1, 1991. Although the October 1st effective date undoubtedly had more significance from the standpoint of the reduction in appellant's position from 75% to 50% than from the standpoint of the changes in the duties and responsibilities of appellant's position, respondent never made this distinction in any notice to appellant. Since the only conceivable written notice respondent provided to appellant of the changes in her duties and responsibilities under §230.09(2)(c), Stats., was to show her a copy of a draft PD, while advising her that it would not go into effect until October 1, 1991, the Commission must conclude that to the extent respondent provided written notice of the changes in the duties and responsibilities of appellant's position, it committed itself to an effective date of no earlier than October 1, 1991, as specified in its notice. Therefore, appellant's appeal, filed October 28, 1991, must be considered timely pursuant to §230.44(3), Stats.

Turning to the merits, appellant provided expert opinion testimony by Roberta Miller, a Personnel Specialist 6 at DHSS with extensive experience in the state civil service system. She testified that in her opinion, by 1991 appellant's position had been reduced substantially in terms of level of responsibility, accountability, and range of activities performed. She also testified that the position had undergone a change in its duties and responsibilities of more than 50%, and management in effect had created a new position that was more comparable to a PIO 2 classification than to an AA 3

classification. In the Commission's opinion, Ms. Miller's opinion is consistent with the position descriptions, class specifications, and other information of record. This opinion also is reinforced by opinions expressed by Mr. Dokken prior to the commencement of the instant proceeding. In a June 26, 1991, memo to Mr. Tobie (Appellant's Exhibit 3), he stated:

> It would appear that the position has been reduced in responsibility and would probably be more appropriately classified as a Public Information Officer 2 ([PR] 1-10). This undoubtedly occurred when Monika was added to the promotions unit and reflects the problems inherent in the current organizational relationship ... Unless I hear otherwise, I will schedule an audit of Peg's position prior to October 1, 1991, and recommend the appropriate action.

In its May 14, 1992, decision denying respondent's motion to dismiss, the Commission cited Cohen v. DHSS, 84-0072-PC (2/5/87), for the proposition that to establish a constructive disciplinary demotion, an employe must establish not only that changes imposed by management reduced the effective classification of the position, but also that the appointing authority had the intent to cause this result and to effectively discipline the employe. The Commission also discussed appellant's contention that respondent changed her AA 3 position so substantially that it was effectively eliminated, a new position at a lower classification was created, and a constructive demotion in lieu of layoff occurred.

On this record, appellant sustained her burden of proof to establish that management acted to reduce her position with the intent of effectively disciplining her because of dissatisfaction with her performance. While Ms. Petkus did not testify, this finding is supported by inferences from appellant's testimony as well as other parts of the record. A significant change in appellant's position was the removal of responsibility and its assumption by Ms. Petkus. When appellant complained to Ms. Petkus that these reductions in the level of her responsibility made her feel like a technician, Ms. Petkus responded that if appellant did not take on more responsibility, all she would ever be was a technician. While this statement was somewhat cryptic, it was consistent with the notion that Ms. Petkus had been dissatisfied with appellant's work and had been taking over her responsibilities because of her lack of confidence in appellant. This comment makes it less likely that the change in appellant's level of responsibility was attributable simply to Ms.

Petkus's "hands on" style of management. This finding also is supported somewhat by the following language in Mr. Mitchell's April 3, 1991, memo (Respondent's Exhibit K):

> It is clear that we cannot afford 1.75 FTEs in this area, but we do not know how it will shake down. In sorting this out, we need to take into consideration your strengths and interests and the fact that the program guide will be a much less frequent publication than it once was. Your strength is in print: we also have a need in "events" and "promotion," which may or may not suit you well. (emphasis added)

This statement is consistent with a management perspective that appellant's capabilities did not fit well into what management perceived as the direction of the agency, and is consistent with appellant's contention that her position was reduced as part of an effort to effectively demote her.

Appellant also relies on the fact that management never completed a performance evaluation for appellant during her supervision by Ms. Petkus, in violation of §ER 45.03(3), Wis. Adm. Code, which requires annual performance evaluations. There are a number of potential explanations for this omission, including mere inadvertance. However, in the absence of any explanation by respondent, and in the overall context of management's handling of appellant, the failure to follow the civil service code in this regard is probative of an intent to effectively demote her, but to avoid the appearance of a disciplinary motivation by omitting what would have been a negative formal performance evaluation.

Even if appellant had not established that respondent acted with the intent of disciplining her when it made the changes in her position, she has established that she was constructively demoted in lieu of layoff. Due to the changes respondent made to her position, it effectively was eliminated and a new position was created in a lower classification. If respondent had formally recognized what had occurred, it presumably should have provided notice to appellant that due to program and budgetary reasons her position had been changed to the point of having been reconstituted as a new position in the PIO 2 classification, that appellant was a surplus AA 3 for which there was no AA 3 position available, and therefore a reduction in force of AA 3's would have to be accomplished through a layoff process. At least one possible outcome of the handling of this matter in this fashion as an explicit layoff situation is that

appellant would have had mandatory transfer rights to the AA 3 position that was vacant in December 1991, in accordance with §ER-Pers 22.08(1), Wis. Adm. Code. However, since respondent did not follow a layoff process and prepare a layoff plan, it is impossible to determine how this would have played out. There are a number of factors involved in a layoff plan that could have impacted on the possibility that appellant could have transferred to the vacant AA 3 position. For example, if there had been another AA 3 in the layoff group with more seniority than appellant, that person would have had first rights to transfer to the AA 3 vacancy, pursuant to §ER-Pers 22.08, Wis. Adm. Code. Also, the appointing authority has a certain degree of discretion to exercise, which conceivably could have had an impact on appellant's status, see, e.g., §§ER-Pers 22.035, 22.06, Wis. Adm. Code; Weaver v. Wisconsin Personnel Board, 71 Wis. 2d 46, 49, 237 N.W. 2d 183 (1975) (action of appointing authority in layoff only need meet requirements of civil service code and not be arbitrary or capricious).

The parties stipulated to hear the issue of damages as part of this hearing. The Commission has no authority in this type of proceeding to award compensatory or punitive damages. See 1 AM JUR 2d Administrative Law §184 (in the absence of an express grant of statutory authority, an administrative agency has no power to award damages). Appellant, who resigned from employment with respondent effective January 3, 1992, and began employment with the UW School of Business effective May 4, 1992, has not taken a position on reinstatement.[2] Also, her prior position is no longer in existence, a factor which would militate against a reinstatement order, see Johns v. Whirlpool Corp., 55 FEP Cases 850, 851 (D. Kan. 1988), as would her resignation under conditions which have not been alleged to constitute a constructive discharge, and which do not meet any standard for a constructive discharge, see Derr v. Gulf Oil Co., 796 F. 2d 340, 41 FEP Cases 166, 168-69 (10th Cir. 1986); Fancher v. Ninno, 539 F. Supp. 1324, 33 FEP Cases 1190, 1197-98 (E.D. Ark. 1982); Marten Transport Co. v. DILHR, 176 Wis. 2d 1012, 501 N.W. 2d 391 (1993). Under these circumstances, reinstatement will not be ordered.

With respect to back pay, there is no evidence that appellant had any loss of pay while at the ECB as a result of the changes that were made in her

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[2] In her posthearing brief, appellant does not request any specific remedy beyond granting her appeal and ordering "appropriate relief."

position. As to the period after her resignation, there is no evidence that she suffered any net loss of pay, and since appellant has the burden of proof, the Commission must conclude she did not. Furthermore, in light of appellant's resignation under these circumstances, she would not be entitled to back pay in any event. Id.

ORDER

Respondent's action of constructively demoting appellant is rejected.

Dated:_____, 1994 STATE PERSONNEL COMMISSION

_____
LAURIE R. McCALLUM, Chairperson

AJT:rcr

_____
DONALD R. MURPHY, Commissioner

_____
JUDY M. ROGERS, Commissioner

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