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MARGARET E. DAVIS,

Appellant,

v.

Executive Director, EDUCATIONAL
COMMUNICATION BOARD,

Respondent.

Case No. 91-0214-PC

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RULING ON
MOTIONS FOR
RECONSIDERATION

The Commission entered an order on May 14, 1992, granting in part and denying in part respondent's motion to dismiss for failure to state a claim. Both parties have filed motions for reconsideration and briefs with respect to said motion.

Respondent's motion for reconsideration runs to the Commission's decision, in reliance on its prior holding in Cohen v. DHSS, 84-0072-PC (2/5/87), that appellant had alleged a cognizable claim of constructive demotion. Respondent argues that since §ER-Pers 1.02(5), Wis. Admin. Code, defines "demotion" as "the permanent appointment of an employe with permanent status in one class to a position in a lower class than the highest position currently held in which the employe has permanent status in class," there has to be both a change in position and a reduction in class before there can be a demotion that is appealable under §230.44(1)(c), Stats. However, the very concept of a constructive personnel transaction is that it does not facially meet the definition for the transaction but is treated the same because of its effect. In Watkins v. Milwaukee Co. Civil Service Comm., 88 Wis. 2d 411, 420, 276 N.W. 2d 775 (1979), the employe had resigned (allegedly under coercion), and on the face of it there was no basis for a hearing before the civil service commission under §63.10, Stats. (1973), which provided for a hearing only after an appointing authority had filed charges against the employe. The Court's discussion of this issue included the following:

Petitioner 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.

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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.

Respondent contends that a constructive demotion theory should not be recognized until the classification of the new position actually is lowered, and that otherwise an employee would be permitted to appeal based solely on speculations about the future. However, under the Cohen holding, the employee is required to establish at the appeal hearing that the new position, although nominally at the same class level as the prior position, in fact is misclassified:

The focus ... 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.

The other element of a constructive demotion that the employee must establish under Cohen is that the employer intended to cause a reduction in the classification level of the employee's position thereby effectively disciplining the employee. If the employee 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.

In dismissing appellant's claim of constructive layoff, the Commission primarily relied on the conclusion that a reduction in hours did not appear to meet the definition of layoff in §ER-Pers 1.02(11), Wis. Adm. Code: "termination of services of an employe... from a position." The Commission also noted the anomalous policy result from appellant's contention that under certain conditions a part-time employee could displace (bump) a full-time employee. In support of her motion for reconsideration, appellant argues that the latter

policy concern is dispelled by §ER-Pers 22.06(1), Wis. Adm. Code, which provides that: "[f]ull-time and part-time positions may constitute different layoff groups." However, this rule does not eliminate the possibility that an employe facing a reduction in hours could displace a full-time employe if a reduction in hours were considered a layoff. Section ER-Pers 22.06, "Procedure for making layoffs," provides for layoff groups, which are used to determine which employes actually will be designated to face layoff. Once an employe has been designated for layoff pursuant to §ER-Pers 22.06(3), the provisions of ER-Pers 22.08 "Alternatives to termination in the service as a result of layoff" come in to play:


If an employe with permanent status in class has received a notice of layoff under ER-Pers 22.07 these alternatives shall be available in the order listed below until the effective date of the layoff. Employes in the same layoff group who are laid off on the same date shall have the right to exercise the following alternatives to termination from the service as a result of layoff in direct order of their seniority, most senior first.

The operation of §ER-Pers 22.08(3) "DISPLACEMENT" is not limited to positions within the layoff group: "[i]f there is no position available under subs. (1) ["TRANSFER"] and (2) ["DEMOTION AS A RESULT OF LAYOFF"] at the same or higher level than any position obtainable under this subsection, an employe may exercise a right of displacement within the employing unit." (emphasis added)

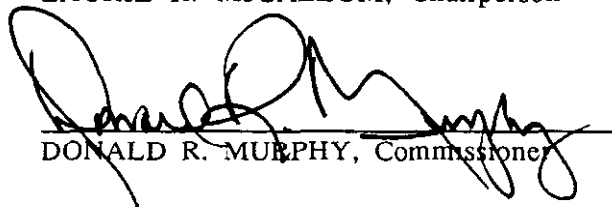
ORDER

Respondent's motion for reconsideration filed May 20, 1992, and appellant's motion for reconsideration filed June 4, 1992, are denied.

Dated: June 12, 1992 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

AJT/gdt/2


DONALD R. MURPHY, Commissioner