

restoration rights to that position and then reappointing him, this time on an acting basis, as administrator of the Division of Workers Compensation. The respondent's purpose in this transaction was to allow Frigo to be paid at the Attorney 14-Management level while he served as the acting administrator of the workers compensation division.

Frigo did serve as acting administrator of the workers compensation division until October 1993, when the Department of Employment Relations informed the respondent that acting assignments to unclassified positions could not be made. Frigo then returned to the UC division as deputy director of BOLA. Effective October 17, 1993, the respondent reassigned Frigo as director of BOLA and reassigned the appellant as deputy director. The appellant filed a timely appeal with the Personnel Commission, challenging his reassignment as deputy director.

DISCUSSION

The appellant asserts that the reassignment was a demotion and that the Personnel Commission therefore has jurisdiction under sec. 230.44(1)(c), Stats. The respondent asserts that the reassignment was a transfer, not a demotion, and that the Commission is without jurisdiction in this matter.

Under sec. 230.44(1)(c), Stats., an employee having permanent status in class may appeal a demotion to the Personnel Commission, if the appeal alleges that the demotion was without just cause. Section ER 1.02(8), Wis. Adm. Code, and sec. ER-Pers 1.02(5), Wis. Adm. Code, define "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" The respondent reassigned the appellant from one Attorney 14-Management position to another Attorney 14-Management position. Although the two positions have different working titles and somewhat different duties, they are in the same class. Therefore, no demotion, at least as defined by the applicable administrative code, occurred.

The appellant argues that his reassignment as deputy director was a constructive demotion. The Commission has held that it has jurisdiction to entertain an appeal of a constructive demotion. In Cohen v. DHSS, 84-0072-PC,

86-0031-PC, Cohen v. DHSS & DER, 84-0094-PC (2/5/87), the Commission ruled that a constructive demotion requires 1) a movement of the affected employe to a position that is ultimately determined to have a lower classification than the employe's original position; and 2) with the intent to discipline the employe.

Under Cohen, therefore, one cannot consider the respondent to have constructively demoted the appellant unless the appellant's duties have changed to the extent that his position should be reclassified to a class lower than Attorney 14-Management, and unless the personnel transaction in question was taken with the intent to discipline the appellant. The appellant does not make either assertion.

It is undisputed that the respondent reassigned the appellant from one Attorney 14-Management position to another Attorney 14-Management position. While the appellant does assert that the duties of his position have changed somewhat, he does not argue that his position should or will be reclassified to a lower level. (As deputy director, the appellant continues to supervise two Attorney 14-Management positions.) Nor does the appellant attribute his reassignment to a motive on the part of the respondent to discipline him; rather, the appellant explicitly attributes the decision to respondent's alleged desire to show favor to Frigo. Applying the standard set forth by the Commission in Cohen, therefore, one cannot conclude that the respondent's decision to reassign the appellant to the position of deputy director constituted a constructive demotion.

The facts available indicate that the respondent transferred rather than demoted the appellant. Section ER 1.02(46), Wis. Adm. Code, defines a "transfer" as "the permanent appointment of an employe to a different position assigned to a class having the same or counterpart pay rate or pay range as a class to which any of the employe's current positions is assigned." The transfer of an employe from one position in one class to another position within that same class is clearly a transfer under the administrative code.

In addition to arguing that the respondent constructively demoted the appellant, the appellant makes two alternative arguments as to why the Commission has jurisdiction over this appeal. First, the appellant argues that the Commission has jurisdiction over this appeal pursuant to sec. 230.44(1)(a),

Stats., which grants jurisdiction to the Commission over appeals challenging personnel decisions made by the "administrator," or made by an appointing authority under authority delegated by the "administrator," pointing out that the UC division administrator made the transfer decision. However, the appellant's argument in this regard misses the mark because the "administrator" referred to in sec. 230.44(1)(a), Stats., is the administrator of the Division of Merit Recruitment and Selection. Section 230.03(1), Stats. An appointing authority's power to transfer an employee is not a decision delegated by the administrator of DMRS; rather, the administrator of DMRS is *required* to approve a transfer when, *inter alia*, an appointing authority requests the transfer and the appointing authority also determines that the employee to be transferred is qualified for the new position. Sections ER-Pers 15.01 and 15.02, Wis. Adm. Code. (However, the administrator of DMRS may delegate this mandatory *approval* authority to appointing authorities; section ER-Pers 15.02, Wis. Adm. Code.)

Finally, the appellant argues that the Commission has jurisdiction pursuant to sec. 230.44(1)(d), Stats., which relates to "[a] personnel action after certification which is related to the hiring process in the classified service and which is alleged to be illegal or an abuse of discretion . . ." The appellant argues that this statute applies in this case because the personnel action at issue here:

. . . took place after certification through the civil service recruitment process and was related to the classified service hiring process in that appellant had no notice that the BOLA Director position he was applied [sic] for in the spring of 1990, the position which DILHR offered to him, and the position that he ultimately accepted, was anything but a permanent position.

Brief of Appellant at 7.

The appellant attempts to link Commission jurisdiction over an appeal of this transfer to the fact the transfer was made subsequent to the appellant's original hire as director of BOLA. To stretch the meaning of sec. 230.44(1)(d), Stats., in the context suggested by the appellant would constitute an unreasonable distortion of the statutory term "related to the hiring process." Compare Cleasby v. DOT, 82-0227-PC (12/29/82) (denial of application for health

insurance not cognizable under sec. 230.44(1)(d), Stats., notwithstanding that policy on health insurance was discussed during hiring interview).

However, a transfer is a form of permanent appointment and is therefore related to the hiring process. Sections ER-Pers 1.02(2) and 1.02(33), Wis. Adm. Code. The fact that no certification occurred in this case does not deprive the Commission of jurisdiction under sec. 230.44(1)(d), Stats. In Wing v. DER, 84-0084-PC (4/3/85), and Seep v. DHSS, 83-0032-PC, 83-0017-PC-ER (10/10/84), the Commission ruled that the phrase "after certification" in sec. 230.44(1)(d), Stats., refers to a specific point in the hiring process and also delineates the DMRS administrator's legal authority in the selection process from that of the appointing authority. "The apparent intent of sec. 230.44(1)(d), Stats., is to permit, inter alia, appeals of appointment decisions. . . . There are no apparent policy reasons for interpreting sec. 230.44(1)(d), Stats., to permit appeals of appointment decisions only when an actual certification by the [DMRS] administrator preceded the selection decision." Wing, slip op. at 7. The respondent's decision to transfer the appellant was a "personnel action," it was "related to the hiring process in the classified service," and it was "after certification" in the sense that certification refers to a line of demarcation in the staffing process, not a particular action that is a prerequisite for Commission jurisdiction. Compare Seep, slip op. at 9.

The undisputed facts indicate that the respondent transferred rather than demoted the appellant. The Commission has jurisdiction over this appeal under sec. 230.44(1)(d), Stats., to the extent this appeal challenges the respondent's transfer of the appellant as being illegal or an abuse of discretion.

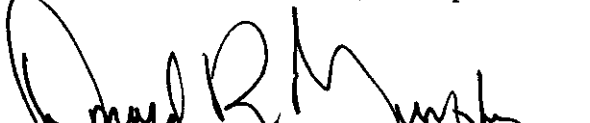
ORDER

The respondent's motion to dismiss is denied.

Dated: February 23, 1994 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

ACK:rulings


DONALD R. MURPHY, Commissioner