STATE OF WISCONSIN PERSONNEL COMMISSION

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EMERY HEATH and HELEN MORK,

Appellants,

v.

Secretary, DEPARTMENT OF CORRECTIONS and Secretary, DEPARTMENT OF EMPLOYMENT RELATIONS,

Respondents.

Case No. 94-0550-PC

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RULING ON RESPONDENT DOC'S MOTION TO DISMISS

On July 7, 1994, the Commission received an appeal filed by Mr. Heath and Ms. Mork, which was assigned case number 93-0550-PC (hereafter, This Appeal). This Appeal was held in abeyance until resolution of their appeal in case number 93-0143-PC (hereafter, Prior Case). On November 3, 1994, the Commission received a Motion to Dismiss filed by the Department of Corrections (DOC) in This Appeal. A briefing schedule was established whereby appellants and DOC filed written arguments, with the Commission receiving the last brief on December 6, 1994.

The facts recited below are based upon information from the parties which appear to be undisputed.[1] These findings are made solely for the purpose of resolving the motion.

FINDINGS OF FACT

1. Prior to March 22, 1992, the appellants were employed in DOC's Division of Adult Institutions; Mr. Heath as a Supervising Officer-2, and Ms. Mork as an Administrative Assistant 3. Both positions were at pay range (PR) 01-13. Effective March 22, 1992, each appellant voluntarily demoted to DOC's Division of Probation and Parole to positions as Probation and

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[1] The facts include information provided to the Commission in the Prior Case, including findings reflected in the Interim Decision and Order issued on 6/23/94, DOC's 6/17/94 letter to the Commission with attachments, and appellants' proposed exhibits tendered by letter dated 6/30/94.

Parole Agent 1 (PPA-1) at PR 12-02, a classification represented by the Professional Social Services Bargaining Unit. These transactions were confirmed by letter, which indicated each appellant's pay would remain the same in the PPA-1 position. Accordingly, Mr. Heath's hourly salary upon demotion remained the same at $13.396, and Ms. Mork's remained the same at $12.265.

2. Appellants "voluntarily demoted within an agency", within the meaning of ER-MRS 17.04(3), Wis. Admin. Code (formerly entitled ER-Pers). Accordingly, each had reinstatement rights pursuant to ER-MRS 16.035, Wis. Admin. Code (WAC), which provides in pertinent part as follows:

> **ER-MRS 16.035 Types and conditions of reinstatement.** (1) GENERAL. An employe who has . . . accepted a voluntary demotion for personal reasons shall be eligible for reinstatement in any agency for 3 years from the date of resignation or demotion. (Emphasis contained in original.)

3. "Reinstatement" is defined in ER 1.02(29), WAC, as follows:

> (29) "Reinstatement" means the act of permissive re-appointment without competition of an employe or former employe under ss. 230.31, 230.33 or 230.34, Stats., to a position:
>
> (a) In the same class in which the person was previously employed;
> (b) In another class to which the person would have been eligible to transfer had there been no break in employment; or
> (c) In a class having a lower pay rate or pay range maximum for which the person is qualified to perform the work after the customary orientation provided to newly hired workers in the position.

4. After demoting to the PPA-1 positions on 3/22/92, the appellants were each required to complete a 12-month probationary period.

5. On or about 5/1/92, Mr. Heath began performing the duties and responsibilities of a PPA-2 (which was less than 2 months into his 12-month probationary period). On or about 10/1/92, Ms. Mork began performing PPA-2 duties and responsibilities (which was a little more than 6 months into her 12-month probationary period).

6. On or about 4/3/93, Mr. Heath and Ms. Mork were taken off probation. At about the same time they requested that their positions be assigned to the PPA-2 level at PR 12-04, but were informed orally that the request could not be granted until another 6 months had expired. Appellants' Prior Case contested the 6-month delay.

7. Appellants' request had two components. First, they were asking that their positions be reclassified to the PPA-2 level, and that they, as the incumbents, be regraded to the PPA-2 level. The dual aspect of the request is clear from the definitions of reclassification and regrade found in ER 1.02, WAC, as shown below.

> (39) "Reclassification" means the assignment of a filled position to a different class by the secretary as provided in s. ER 3.01(3).
>
> (40) "Regrade" means the determination of the secretary under s. 230.09(2)(d), Stats., that the incumbent of a filled position which has been reallocated or reclassified should remain in the position without opening the position to other candidates.

8. On 10/31/93, DOC placed Mr. Heath and his position at the PPA-2 level. The same transactions followed for Ms. Mork, effective 11/14/93.

9. Appellants' Prior Case was resolved in October 1994, when DOC agreed to back-date assignment of the PPA-2 level to 4/4/93, for each appellant.

10. DOC's Personnel Administrative Officer, Sanger Powers, sent each appellant a letter dated 5/31/94. The letter provided notice that DOC felt appellants' pay upon achieving PPA-2 status in October/November 1993, was incorrectly calculated. DOC claimed the error resulted in an overpayment of $371.44 for Mr. Heath for the period from 10/31/93 to 5/14/94, and an overpayment of $377.52 for Ms. Mork for the period from 11/14/93 to 5/14/94. DOC further claimed the error necessitated a reduction of each appellant's hourly wage as of 5/15/94, as follows: a) for Mr. Heath, a reduction from $14.528 to $14.181 (a reduction of $0.347), and b) for Ms. Mork, a reduction from $13.148 to $12.983 (a reduction of $0.363).[2]

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[2] Appellant Mork asserts that her pay was reduced more than stated in her notice letter. Specifically, the notice indicated a reduction to $12.983, whereas

11. According to Mr. Powers, each appellant was given a "one within range pay step increase" within the meaning of ER 29.03(3)(c)1., WAC, when DOC first authorized the PPA-2 level in October/November 1993. DOC later determined appellants should have received "the pay rate calculated as if they had been reinstated or restored to the class from which reinstatement eligibility . . . are derived", within the meaning of ER 29.03(3)(b)2., as applicable pursuant to ER 29.03(3)(c)2., WAC.

12. Each code section cited in the prior paragraph is shown below in relevant part..

> **ER 29.03 Transaction pay adjustments.**
> * * *
> (3) PAY ON REGRADE.
> * * *
> (b) *Reallocation to a higher class.* The pay of regraded employes whose positions are reallocated to a higher class shall be determined as follows:
> * * *
> 2. Regraded employes, except trainees, who have reinstatement eligibility or restoration rights to a higher class than the class from which regraded shall receive the pay rate calculated as if they had been reinstated or restored to the class from which reinstatement eligibility or restoration rights are derived or the amount provided under subd. 1. a., b. or c; whichever is greater.
> (c) *Reclassification to a higher class.* The pay of regraded employes whose positions are reclassified to a higher class shall be determined as follows:
> 1. Regraded employes who do not have reinstatement eligibility . . . rights to a class higher than the class from which regraded shall . . . receive a base pay increase to the PSICM of the new class or a one within range pay step increase, whichever is greater, subject to the pay range maximum.
> 2. Regraded employes who have reinstatement eligibility or restoration rights to the class to which regraded shall receive a pay rate equal to the amount determined under par. (b)2.

(Underlining added for emphasis.)

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she claims the reduction taken was to $12.383. Pay stubs were not provided to verify this allegation.

DISCUSSION

Timeliness Issue

It was unclear from DOC's initial motion materials whether DOC thought This Appeal was filed untimely. Each party was provided an opportunity to address any timeliness concerns which might exist. The Commission's decision on the subject-matter jurisdiction portion of DOC's motion, makes it unnecessary for the Commission to resolve any potential timeliness issue.

Subject-Matter Jurisdiction

General Statutory Provisions

DOC argues that the Commission lacks jurisdiction to hear appellants' appeal which questions the amount of pay to which they were entitled upon being granted the PPA-2 level. The Commission's jurisdiction is limited by statute. Pertinent in Mr. Heath and Ms. Mork's appeal is the provision in s. 230.45(1), Stats., which gives the Commission authority to hear appeals under s. 230.44, Stats., shown below in relevant part. Text references to the "Secretary" are to the Secretary of the Department of Employment Relations (DER). Text references to "Administrator", are to the Administrator of DER's Division of Merit, Recruitment and Selection (DMRS).

> **230.44 Appeal procedures. (1)** APPEALABLE ACTIONS AND STEPS. . . . The following actions are appealable to the commission under s. 230.45(1)(a):
>
> (a) *Decision made or delegated by administrator.* Appeal of a personnel decision under this subchapter made by the administrator or by an appointing authority under authority delegated by the administrator under s. 230.05(2) [the general provision regarding the Administrator's authority to delegate].
>
> (b) *Decision made or delegated by secretary.* Appeal of a personnel decision under s. 230.09(2)(a) [pertaining to allocation, reallocation and reclassification decisions] or (d) [pertaining to an incumbent's fate when a filled position is reallocated or reclassified] or 230.13(l) [pertaining to certain closed records] made by the secretary or by an appointing authority under authority delegated by the secretary under s. 230.04(1m) [the general provision regarding the Secretary's authority to delegate].

> (c) *Demotion, layoff, suspension or discharge.* If an employe has permanent status in class, . . . the employe may appeal a demotion, layoff, suspension, discharge or reduction in base pay to the commission, if the appeal alleges that the decision was not based on just cause.
> (d) *Illegal action or abuse of discretion.* 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 may be appealed to the commission.
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> (Emphasis appears in the original text. Information in brackets was added for clarity.)

Nature of this appeal

DOC granted appellants' request for reclassification and regrade. These are actions over which the Commission would have had jurisdiction under s. 230.44(1)(b), Stats., if a dispute existed. These are decisions made or delegated to DOC by the Secretary involving the following two actions: a) under s. 230.09(2)(a), Stats., whether a request to reclassify a position should be granted; and b) to determine under s. 230.09(2)(d), Stats., whether the incumbent should be regraded where reclassification of the position occurs.

The dispute in this case is whether the pay calculations made as a result of the granted reclassification and regrade were correct.

Commission jurisdiction does not exist under s. 230.44(1)(b), Stats.

Appellants argue on p. 4 of their brief, that the actions of reclassification and regrade as so intertwined with the resulting pay that they should be considered together as one issue cognizable under s. 230.44(1)(b), Stats. Such result would be contrary to a plain reading of the statutes and contrary to prior Commission decisions.

The Commission in Garr, et al. v. DER, 90-0163, etc. (1/11/91), held that reallocations were appealable pursuant to s. 230.09(2), Stats., but the corresponding salary adjustments were not. The Commission noted that its jurisdiction for reallocations was dependent upon the specific statutory reference in its jurisdictional statute (in s. 230.44(1)(b), Stats.) to the statutory provision relating to reallocations (in s. 230.09(2)(a), Stats.) The Commission concluded that the wages resulting from reallocations are not within its jurisdiction because the Commission's jurisdictional statute lacked reference to

the statutory provision relating to pay upon reallocation (in s. 230.09(2)(f), Stats.)

The Garr rationale applies to Mr. Heath and Ms. Mork's case too. The Commission's jurisdictional statute contains specific references to the statutory provisions for reclassification and regrade, but lacks specific references to the statutory provision relating to the resulting pay.

Commission jurisdiction does not exist under s. 230.44(1)(c), Stats.

Appellants argued on page 4 of their brief, that jurisdiction exists under s. 230.44(1)(c), Stats., because the appeal involves a "reduction in base pay". Even if this argument had potential applicability, it would be superseded by s. 111.93(3), Stats., which states in pertinent part as shown below.

> **111.93 Effect of labor organization; status of existing benefits and rights.**
> * * *
> (3) . . . [I]f a collective bargaining agreement exists between the employer and a labor organization representing employes in a collective bargaining unit, the provisions of that agreement shall supersede the provisions of civil service and other applicable statutes . . . related to wages . . . whether or not the matters contained therein are set forth in the collective bargaining agreement.

Appellants' positions were covered by a "bargaining agreement", within the meaning of s. 111.93(3), Stats. Further, the "determination of an incumbent's pay status resulting from position reallocation or reclassification" is a bargainable issue, pursuant to s. 111.91, Stats. Any potential jurisdiction which the Commission might have had under Ch. 230, Stats., over the pay issue raised in this case would be superseded by the bargaining agreement.[3]

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[3] Appellants also raised a jurisdictional argument based on certain provisions of Ch. ER 46, WAC. To the extent appellants may be contending the Commission has jurisdiction over This Appeal as a non-contractual grievance, Ch. ER 46, WAC, is inapplicable to them because their positions were covered by a bargaining agreement. Specifically, ER 46.01(1), WAC, makes it clear that the chapter pertains only to "state employes who are not covered by a collective bargaining agreement under subch. V of ch. 111, Stats." Also, appellants'

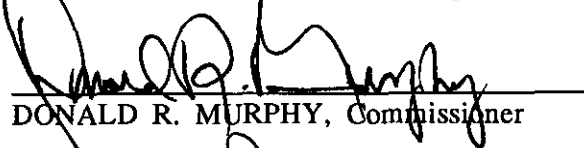
ORDER

Respondent DOC's motion is granted and this appeal is dismissed for lack of subject matter jurisdiction.

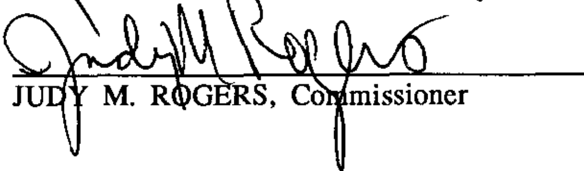
Dated December 22, 1994.

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson



DONALD R. MURPHY, Commissioner



JUDY M. ROGERS, Commissioner

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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 per-

citation to sections of Ch. ER 46, WAC, which refer to the Commission's appellate authority does not advance their underlying argument concerning subject matter jurisdiction.

sonally, 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.