STATE OF WISCONSIN PERSONNEL COMMISSION

PETER STACY,
Appellant,

v.

Secretary, DEPARTMENT OF CORRECTIONS,
Respondent.

Case No. 97-0098-PC

RULING ON RESPONDENT'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

Respondent raised a jurisdictional issue at a prehearing conference held on November 18, 1997. The final brief was filed on February 17, 1998.

The facts recited below are undisputed by the parties unless specifically noted to the contrary.

FACTS

1. The present appeal was filed on October 8, 1997. The facts asserted as forming the basis for the appeal are shown below:

> Peter Stacy is the superintendent of the St. Croix Correctional Center in New Richmond, Wisconsin. In June of this year, over a period of two days, an intensive intervention took place, upon the decision of Mr. Stacy, after notification to the warden of the Wisconsin Correctional Center System (his supervisor's supervisor) and receiving his authorization to do so. Questions regarding the use of restraints on one inmate during the second day of the program (which were used pursuant to Department policy) were raised. Though initially investigated and a determination made that Mr. Stacy's actions did not constitute abuse of inmates as defined under Wisconsin Statute 940.29, another investigation is being conducted. Mr. Stacy has been re-assigned during the investigation.
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> The reason the appellant believes the action to be improper.
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> 1. The appellant is not aware of any legal authority for reassignment under state law.
> 2. The appellant believes that such action was taken without just cause.
> 3. The appellant believes that the action was a violation of the appellant's rights of due process.
> 4. The appellant believes the action was inconsistent with past and current practices of the Department in similar situations.
> 5. The appellant believes the action is arbitrary and capricious.

2. The appeal is based on respondent's action described in a letter to appellant dated September 5, 1997, from Phil Kingston, Assistant Administrator of the Division of Community Corrections. (A copy of the referenced letter was attached to the appeal.) Mr. Kingston's letter stated as follows in pertinent part:

> After review of the initial allegations made concerning inmate (LP), the decision has been made to conduct a more complete investigation into the matter. It is anticipated that this investigation will require a period of time to complete.
>
> A decision has also been made that during the period of investigation, you are to be assigned to the Hudson Community Corrections Office at 1920 Crestview Drive in Hudson, Wisconsin. You are to report to this work location at 7:45 a.m. on Monday, September 8, 1997. You will continue to report to Sandi Sweney while you are stationed at the Hudson Office. I will be discussing your work assignments with Ms. Sweney in the near future and these will be communicated to you on Monday, September 8, 1997.

3. Respondent is holding its own investigation in abeyance pending the outcome of a criminal investigation by the Eau Claire County District Attorney. (See DOC letter dated 12/12/97, and page 4 of appellant's brief dated January 6, 1998.)

4. It is undisputed that the "temporary" duties performed by appellant at the Hudson Community Corrections Office are below the level of duties from a classification standpoint than the duties he performed as Superintendent of the St. Croix Correctional Center. These "temporary" duties include developing a training guide for use in training officers when they transfer or are hired off a promotional list (Exh. F, attached to complainant's initial brief dated 1/6/98), reviewing current practices for management of offender risk and assessment and developing new strategies for case management (Exh. G, attached to complainant's initial brief dated 1/6/98).

5. Appellant retains his classification and all related benefits during the "temporary" reassignment to the Hudson Community Corrections Office. In a related vein, appellant made the following observation in the brief filed on February 17, 1998 (p. 5):

> And now, seven months after the "incident", and five months after this "temporary duty assignment," there is still not a hint of the status of the criminal investigation or this, the second personnel investigation. And as for the substance, the first departmental investigation, conducted by Unit Supervisor Daniel Benzer, long ago concluded there was no violation of policy, there was nothing inherently complex, no facts to be discovered, nor anything novel or pertinent to add to the possible

> quantum of evidence available regarding anyone's conduct. The appellant quite legitimately asks how long he must wait to have his status as a civil servant determined. There are enough well publicized, seemingly interminable, investigations being conducted these days that the appellant's lack of confidence in expeditious resolution is understandable.

OPINION

The Commission, as an administrative agency, only has those powers which are expressly conferred or which are fairly implied from the four corners of the statute under which it operates. *State (Dept. of Admin.) v. ILHR Dept.*, 77 Wis. 2d 126, 136, 252 N.W.2d 353 (1977).

The Commission's jurisdiction to hear appeals is described in §§230.45(1)(a) & (c) and 230.44(1), Stats. Section 230.45(1)(c), Stats., is inapplicable here because Mr. Stacy did not allege in this appeal that the Commission had jurisdiction as a final step arbiter.[1]. Section 230.44(1)(a), Stats., is inapplicable because Mr. Stacy is not challenging a decision made or delegated by the Administrator of the Division of Merit Recruitment and Selection (DMRS). Section 230.44(1)(b), Stats, is inapplicable because Mr. Stacy is not challenging a decision made or delegated by the Secretary of the Department of Employment Relations (DER). Section 230.44(1)(d), Stats., is inapplicable because Mr. Stacy is not raising an issue related to the hiring process. Section 230.44(1)(f), Stats. is inapplicable because Mr. Stacy does not allege that respondent's current action was taken pursuant to §230.337, Stats., nor would the facts support such an allegation.

The only potential basis for Commission jurisdiction in this appeal is under §230.44(1)(c), Stats., the text of which is shown below in relevant part:

> *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.

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[1] Mr. Stacy filed a later appeal on January 8, 1998, which was processed as a final step arbitration appeal. *Stacy v. DOC*, 98-0006-PC The issues raised in the later appeal include DOC's temporary reassignment of Mr. Stacy. The later appeal is pending with a prehearing conference schedule for February 24, 1998.

The appellant contends the Commission has jurisdiction to consider this appeal as a "constructive demotion."[2] Respondent contends the elements of a constructive demotion are not present and the Commission, accordingly, lacks jurisdiction. The Commission agrees with respondent, for reasons discussed below.

The term "demotion" is undefined in Ch. 230, Stats., but is defined the same way in rules promulgated by DER and DMRS under Ch. 230, Stats. The essentially identical texts of §ER-MRS 1.02(5) and §ER 1.02(8), Wis. Admin. Code, are shown below:

> "Demotion" means 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, unless excluded under s. ER-MRS 17.02.

The Commission has relied consistently on the code definition of demotion for interpretation of the undefined term in §230.44(1)(c), Stats. *Dusso v. DER & DRL*, 94-0490-PC, 7/23/96; *Davis v. ECB*, 91-0214-PC, 6/21/94; and *Cohen v. DHSS*, 84-0072, etc.-PC, 2/5/87. It is clear from the code definition recited above that a demotion does not occur unless there has been a permanent change via appointment to another position in a lower classification.

If all elements of a demotion were present in a literal sense then the issue would be one of demotion. It follows that not all elements of a demotion must literally be present when considering whether a *constructive demotion* occurs. This principle has been recognized by the Commission in the *Cohen* and *Davis* decisions cited in the prior paragraph, as well as by the Wisconsin Supreme Court. *See*, *Watkins v. Milwaukee Co. Civil Service Commn.*, 88 Wis. 23 411, 276 N.W.2d 775 (1979) (Separation from employment by reason of coerced resignation is in substance a discharge even though no formal charges were filed against the employe.)

The Commission in *Cohen* addressed the propriety of including as an issue for hearing whether the appellant was demoted "constructively or otherwise" when he was moved from his position as Director of the Bureau of Social Security Disability

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[2] Appellant also said the appeal was filed based on §230.34(1)(a), Stats. (See brief filed 2/17/98, p. 2.) Section 230.34(1)(a), Stats., states that an employe with permanent status in class may be removed, suspended without pay, discharged, demoted or base pay reduced only for "just cause." The Commission's statutory grant of authority under §§230.45(1)(a) and 230.44(1), Stats., does not include the power to review actions brought under §230.34(1)(a), Stats. Therefore, to the extent that the scope of §230.34(1)(a), Stats., could be seen as broader than under §230.44(1)(c), Stats., the Commission's jurisdiction would be limited to the narrower scope of §230.44(1)(c), Stats.

Insurance (BSSDI) to a position as Director of the HMO/AFDC Project. This was a permanent change in assignment designated as a "move" by respondent rather than as a "demotion." The Commission held that respondent's labeling of the transaction as something other than a demotion does not control, stating on pages 3-4 of the decision as follows:

> In addition to reviewing these disciplinary actions identified as demotions, layoffs, suspensions, discharges and reductions in base pay, the Commission may review actions which have the same legal effect as an enumerated disciplinary action even though they may be denominated as something else. . . .

One of the employer's main contentions in *Cohen* was a demotion did not occur because there was a movement to a different position within the same classification rather than a movement to a lower classified position, as specified in §ER-Pers. 17.01, Wis. Adm. Code. The Commission's response (*Cohen*, p. 5) is noted below:

> The Commission agrees with the respondent to the extent that a demotion does not occur unless the employe is assigned responsibilities that cause his (new) position to be classified at a lower level than the position he had held previously. However, in reaching this conclusion, the Commission is not dispensing with the concept of constructive demotion. That term simply means a personnel action that has the legal effect of a demotion even though the action is not denominated as such.

The Commission in *Cohen* then provided the following guidance on the import of the decision for preparing for hearing, noting (pp. 6-7) as shown below:

> Here, the appellant's BSSDI position [initial position] was apparently classified at the Human Services Administrator 3 (HSA 3) level and his HMO Project Director position [second 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 [second 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 [second 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.
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> In order to avoid possible confusion, it should be emphasized that a constructive demotion requires more than merely a movement of the affected employe to a position that is ultimately determined to have a lower classification than the employe's original position. There also must be an intent by the appointing authority to cause this result and to effectively discipline the employe. Certainly not every employe who is

> transferred into a position which ultimately may be downwardly reclassified has been subjected to a constructive demotion. . . .

The *Cohen* case content is recited above in detail to demonstrate that the Commission was reviewing the issue in the context of a permanent change in appointment.

The basic facts of the *Davis* case were that the appellant's assigned duties were changed over time to the point where the classification of her position was in serious jeopardy. The Commission noted in discussing whether the appeal was timely filed that the job-duty changes became permanent for purposes of commencing the limitations period only after the appellant received formal notice that the changes would be permanent. Thus while the appellant performed the reduced-level duties since about May 1991, the limitations period did not begin until she received notice on October 1, 1991, that the changes would be permanent. Using October 1, 1991, as the date which commenced the limitations period, the Commission found that the appeal was filed timely. (See discussion on pp. 6-8 of the *Davis* proposed decision and order (PDO).)

The *Davis* respondent filed arguments with the Commission after the PDO was issued. The Commission addressed the arguments in its Interim Decision and Order (IDO) dated June 21, 1994. The Commission's discussion of one argument is pertinent here and is recited below (from pp. 3-4 of the IDO):

> Initially, respondent's contention that *Cohen v. DHSS*, 84-0072-PC, 85-0214-PC, 86-0031-PC, 84-0094-PC (2/5/87), requires the actual change in classification as an element of a constructive demotion is incorrect. . . .
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> 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.

Again, the Commission's discussion in *Davis* was in the context of a permanent change in the assignment of job duties.

The main question raised in Mr. Stacy's appeal is whether a constructive demotion can be said to exist based on a "temporary" change in duties at a lower level from a classification standpoint, a change which has been in effect since September 8, 1997, pending resolution of a criminal investigation to be followed by respondent's second investigation when such "temporary" reassignment has had no impact on Mr. Stacy's current classification or wage. The Commission answers this question in the negative. While the concept of *constructive demotion* requires some leeway or deviation from the definition of demotion recited previously from the administrative code, the Commission never has found that a constructive demotion exists without a permanent change in job duties.

Mr. Stacy felt disadvantaged regarding the current briefing schedule because DOC has complied with some of Mr. Stacy's discovery requests but not those which go to the question of whether respondent's "temporary" reassignment was taken with disciplinary intent. As noted in *Davis*, one element of establishing a constructive demotion is to show the employer intended to discipline the employe. However, in the instant case there appears to be no real dispute that appellant's reassignment was made on a temporary basis pending investigation[3] of the alleged abuse of an inmate, albeit appellant complains about the length of time the investigation has been taking. Accordingly, the issue of disciplinary intent is moot.

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[3] In his initial appeal appellant questions the legal authority under the civil service code for a temporary reassignment of this nature. Section 230.06(1)(b), Stats., gives appointing authorities the power to assign employees their duties. *See also*, *Holzhueter v. SHS*, 83-0166-PC, 4/4/84 (Appointing authority has the power to determine, change schedule and prioritize the work assignments, including the right to determine the length of time an employee may spend in a work assignment.)

ORDER

Respondent's motion is granted and this case is dismissed.

Dated: February 19, 1998. STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

JMR
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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 (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) 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.) 2/3/95