STATE OF WISCONSIN PERSONNEL COMMISSION

KATHY WARREN,
Appellant,

v.

Secretary, DEPARTMENT OF HEALTH AND FAMILY SERVICES, and Administrator, DIVISION OF MERIT RECRUITMENT AND SELECTION,
Respondents.

Case No. 00-0147-PC

RULING ON MOTION TO DISMISS

The Department of Health and Family Services (DHFS), by letter dated December 18, 2000, filed a motion to dismiss the above-noted case for lack of subject matter jurisdiction. Both parties were provided an opportunity to submit written arguments with the final brief due on January 29, 2001 (see letter dated December 22, 2000). On April 17, 2001, at Ms. Warren's request, the Commission established a schedule for discovery, as well as a subsequent schedule for filing supplemental briefs with the final brief due on July 10, 2001.

The statement of the hearing issues agreed to by the parties is shown below (see Conference Report dated November 13, 2000 and respondent's letter dated December 18, 2000):

1. Whether respondent's decision to temporarily remove the appellant from a Program Assistant Supervisor 2 position was contrary to §§230.15(3) and/or 230.34(1)(a), Stats.
2. Whether respondent's decision to permanently remove the appellant from the same position as noted in the first issue was contrary to §§230.15(3) and/or 230.34(1)(a), Stats.

The following findings are made based on information presented by the parties and prior decisions in litigation between the same parties[1] in this forum, are made solely to resolve the present motion, and are undisputed unless specifically noted to the contrary.

[1] The Department of Health and Family Services (DHFS) was formerly known as the Department of Health and Social Services (DHSS).

FINDINGS OF FACT

Prior Litigation

1. Warren began working for respondent in April 1987 in the Disability Determination Bureau (DDB). She was promoted to a Program Assistant Supervisor 2 (PASup 2) position in November 1988, but experienced employment problems including conflicts with other supervisors. As a result, sometime prior to April 1991, respondent removed her from her position and placed her in a PASup 2 position in a newly created Telephone Support Unit.[2]

2. In August 1992, Warren was demoted to a Program Assistant 1 (PA1) non-supervisory position.[3] She contested the demotion claiming it was without just cause (Case No. 92-0750-PC), and impermissibly based on her disability (Case No. 92-0234-PC-ER). Respondent did not dispute liability.

3. A combined hearing was held solely on the remedy issue. In an Interim Decision and Order[4], the Commission held that Warren was entitled to back pay up to August 31, 1993, the date her position was eliminated in a reorganization.[5] In a Final Decision and Order[6], the Commission ordered respondent to pay $8,332.65 in fees and costs. Warren sought judicial review of the Commission's decision. Her attorney notified the Commission on September 6, 2000, that all of Warren's claims were settled through June 1996 when Warren was reinstated as a supervisor (see p. 2, letter dated September 6, 2000).

4. Warren was reinstated effective June 10, 1996, to a PASup 2 position in Support Unit 3.[7] On May 18, 1998, one of Warren's subordinates reported that Warren had threatened her and, as a result, respondent placed Warren on paid administrative leave pending an investigation.[8] The investigation later expanded to include additional allegations.[9] An independent investigator concluded that many of Warren's subordinates were fearful of her due to what they

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[2] See Finding of Fact ¶1, *Warren v. DHFS*, 98-0146-PC, 98- 0164-PC-ER, 2/9/01.
[3] *See* Findings of Fact ¶3, *Warren v. DHFS*, 92-0750-PC, 92-0234-PC-ER, 5/15/96.
[4] *Warren v. DHSS*, 92-0750-PC and 92-0234-PC-ER, 5/14/96.
[5] *Id.*, pp. 8-9.
[6] *Warren v. DHSS*, 92-0750-PC and 92-0234-PC-ER, 10/2/96.
[7] *Warren v. DHFS*, 98-0146-PC, 98-0164 -PC-ER, 2/9/01, ¶5, Findings of Fact.
[8] *Id.*, ¶¶29-31, Findings of Fact.
[9] *Id.*, ¶¶33-36, Findings of Fact.

perceived to be the intimidating and frightening manner in which Warren interacted with them,[10] to rumors (that Warren had initiated through conversations with co-workers) relating to violent activities in which she engaged, and to unverified rumors alleging that she had engaged in certain violent activities.[11] The sole allegation which the investigator concluded would be actionable was the threat to the subordinate on May 18, 1998;[12] for which Warren received the equivalent of a 3-day suspension without pay.[13] She contested the suspension claiming it was without just cause (Case No. 98-0146-PC), and was due to her filing a prior complaint, (Case No. 98-0164-PC-ER). The Commission dismissed Case No. 98-0146-PC, concluding that respondent met its burden to show just cause for the suspension and that the degree of discipline was not excessive. The Commission dismissed Case No. 98-0164-PC-ER, finding that Warren failed to show that respondent's action was in retaliation for her engaging in activities protected under the Fair Employment Act.

5. After the disciplinary suspension, Warren was placed on paid administrative leave while the parties discussed various options for her return to work. Respondent indicated during these negotiations its desire to tell employees the nature of the discipline imposed on Warren and the reasons therefore, ostensibly to address fears expressed by certain employees during meetings in 2000 about Warren's return to work.[14] Warren denied this request, as was her right (see letter dated June 23, 2000, attached to appeal letter). During these negotiations, Warren would only consider returning to work in her previous PA Sup3 position, and respondent declined this option.[15]

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6. On June 23, 2000, Judy Fryback, DDB Director, mailed Warren a letter and a memo directing her to return to work effective June 28, 2000. This was not a return to her supervisory position or to any supervisory position. Instead, she was temporarily assigned to

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[10] *Id.*, ¶8, Findings of Fact.
[11] *Id.*, ¶36, Findings of Fact.
[12] *Id.*, ¶¶37-39, Findings of Fact.
[13] *Id.*, ¶¶42-43, Findings of Fact.
[14] *Id.*, ¶47, Findings of Fact.
[15] *Id.*, ¶45, Findings of Fact. Also see, respondent's answer to interrogatory #2 of Warren's first discovery requests.

perform the duties of Case Information Manager for DDB. Her classification was not changed during this temporary placement. (These events are collectively referred to in this ruling as the "temporary decision.")

7. Warren was informed on October 18, 2000 (orally) and on June 14, 2001 (in writing), that she was removed permanently from her supervisory position and placed in a non-supervisory position effective November 5, 2000. (These events are collectively referred to in this ruling as the "permanent decision.")

8. The temporary and permanent decisions were made because respondent did not want Warren in a supervisory position.

9. Respondent contends both decisions were made for the reasons shown below (see response to interrogatories #2 and 3 in Warren's first discovery request):

> The reasons are the history of Ms. Warren's poor job performance, poor supervisory and interpersonal relation skills, and misconduct. These reasons are summarized in (the Commission's decision) in the case of *Warren v. DHFS*, Case #98-0146-PC and 98-0164-PC-ER, as well as in the Opinion section of that decision [and the following Findings of Fact] 8, 10, 14, 23, 24, 27, 29, 39-43, 45-47, 55 and 56. The Department had negotiated with Ms. Warren and her current and past legal counsel in an attempt to reach an agreement regarding her job assignment. Those negotiations were not successful.

The above-referenced paragraphs relate to Warren's threat against the co-worker for which the 3-day suspension was imposed (¶¶ 29, 39, 42 & 43), an employee's complaint in April 1998 that Warren sexually harassed her (¶¶23-24), subordinates' complaints about Warren's supervisory style (¶¶ 10 & 14), an unsatisfactory performance evaluation discussed with Warren on May 13, 1998 (¶27), subordinates' perception that Warren communicated with them in an intimidating and frightening manner (¶8), subordinates' fears of Warren returning to the same position that existed in 1998 and allegedly continued into 2000 (¶¶46-47), Warren's desire to return only to her prior position (¶45) a possibility which the independent investigator suggested was a "recipe for disaster" (¶40), the fact that problems have diminished under a different supervisor during Warren's absence (¶55) and increased vacancy rates allegedly due to fears that Warren would return as supervisor (¶56).

10. As of November 5, 2000, the PA 4 classification is assigned to pay range 2-11 (pay maximum $16.053 per hour) and the PASup 2 classification is assigned to pay range 1-11

(pay maximum $19.001 per hour). The Department of Employment Relations (DER) has designated these as counterpart pay ranges.

11. Warren's pay at all times relevant here was $14.702 per hour. (See respondent's December 18, 2000 letter with Parker's supporting affidavit and the October 20, 2000 letter attached to respondent's June 15, 2001 submission.)

12. The DMRS Administrator has delegated his authority for approving transfers to respondent. Such delegated authority includes voluntary and involuntary transfers. (See Respondents' letter dated July 9, 2001, correcting prior contrary assertions and attaching delegation agreements.)

13. The agreement referenced in the prior paragraph did not include delegated authority for approving acting assignments exceeding 45 calendar days. Respondent was required to consult with the DMRS Administrator when the acting assignment exceeded 45 calendar days (*see* §ER-MRS 32.02, Wis. Adm. Code) and failed to do so.

14. No incidents involving Warren have been reported to respondent since Warren's return to work on June 28, 2000. (See respondent's answer to Interrogatory #6 of Warren's first discovery request.)

OPINION

The previously agreed-upon statement of the hearing issues is repeated below:

> 1. Whether respondent's decision to temporarily remove the appellant from a Program Assistant Supervisor 2 position was contrary to §§230.15(3) and/or 230.34(1)(a), Stats.
>
> 2. Whether respondent's decision to permanently remove the appellant from the same position as noted in the first issue was contrary to §§230.15(3) and/or 230.34(1)(a), Stats.

The text of the referenced statutes is shown below:

> 230.15(3): No person shall be appointed, transferred, removed, reinstated, restored, promoted or reduced in the classified service in any manner or by any means, except as provided in this subchapter.

> 230.34(1)(a): An employee with permanent status in class may be removed, suspended without pay, discharged, reduced in base pay or demoted only for just cause.

An administrative agency only has those powers expressly conferred or 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 powers are noted in §§230.44 and 230.45, Stats., and do not expressly include the power to hear an appeal of a disciplinary action other than those enumerated in §230.44(1)(c): "demotion, layoff, suspension, discharge or reduction in pay." However, as discussed below, the Commission concludes it has jurisdiction over the second hearing issue as a constructive demotion, as well as jurisdiction under §230.44(1)(a) as an appeal of a delegated action of the DMRS Administrator, and accordingly, the statement of the hearing issue is restated in the Order section of this ruling.

I. Subject Matter Jurisdiction: Temporary Decision

The first issue deals with the temporary decision noted in ¶6 of the Findings of Fact. Warren does not argue that the temporary decision constitutes a transfer, apparently in recognition that a transfer is defined as a *permanent* appointment to a different position (see §ER-MRS 1.02(33), Wis. Adm. Code). Instead, Warren argues this action should be characterized as an "acting assignment." She notes that the DMRS Administrator is required to approve an acting assignment exceeding 45 calendar days pursuant to §ER-MRS 32.02, Wis. Adm. Code, and thereby concludes that the Commission has jurisdiction over Issue 1 pursuant to §230.44(1)(a), Stats.

Pertinent statutory and code provisions are noted below in relevant part:

> §230.44(1)(a), Stats.: [T]he following are actions appealable to the commission under §230.45(1)(a):
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> (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 §230.05(2).

> ER-MRS 32.01, Wis. Adm. Code: When a position is vacant and the needs of the service require the performance of the duties of that position, a permanent employee may be temporarily assigned to perform those duties.

> ER-MRS 32.02, Wis. Adm. Code: The appointing authority shall submit a written request to make acting assignments which exceed 45 calendar days in length

> to the administrator for approval. This request shall state the anticipated duration of the acting assignment and provide such additional information as the administrator requires. Acting assignments not to exceed 45 calendar days shall be made at the discretion of the appointing authority.
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> ER-MRS. 32.03, Wis. Adm. Code: (1) The acting assignment shall not exceed a total of 6 months

The Commission previously has held that it lacks the authority under §230.44(1)(a), Stats., to review a contention that an appointing authority violated the provisions of Ch. ER-Pers 32, Wis. Adm. Code (now Ch. ER-MRS 32, Wis. Adm. Code) by failing to seek and obtain approval from the DMRS Administrator for an acting assignment. *Hagman v. DNR*, 84-0194-PC, 1/30/85. Since the approval of the DMRS Administrator was never sought in regard to this assignment, there is no action or omission of the Administrator's to review and, consequently, no action or omission of the Administrator's upon which to establish subject matter jurisdiction pursuant to §230.44(1)(a), Stats. *See, e.g., Bauer v. DATCP & DER*, 91-0128-PC, 4/1/92, at 11.

Section 230.44(1)(c), Stats., provides that certain state employees 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." Respondent, like all appointing authorities, has the right to assign duties to a position. Section 230.06(1)(b), Stats. This action of assigning duties would have to meet certain requirements, including the requirement that the assignment be permanent, in order to qualify as a constructive demotion. *Stacy v. DOC*, 97-0098-PC, 2/19/98, aff'd Pierce Co. Circ. Ct., *Stacy v. Pers. Comm.*, 98-CV-0053, 7/9/98. It is undisputed that the assignment of duties, which is the subject of Issue 1, was temporary. Accordingly, there is no potential constructive demotion claim for the temporary decision.

II. Subject matter jurisdiction: Permanent Decision

The second issue deals with the permanent decision noted in ¶7 of the Findings of Fact. Warren asserts the Commission has subject matter jurisdiction over this action pursuant to §§230.44(1)(a) and (c), Stats.

A. Action Delegated by the DMRS Administrator under §230.44(1)(a), Stats.

Respondent initially contended the Commission lacked jurisdiction under §230.44(1)(a), Stats. The statutory text is repeated below:

> 230.44(1): [T]he following are actions appealable to the commission under §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 §230.05(2).

Respondent subsequently conceded jurisdiction under §230.44(1)(a), Stats., on the permanent decision apparently after realizing that the DMRS Administrator had delegated its transfer authority to respondent (see ¶12, Findings of Fact). Due to this concession, the Commission finds jurisdiction over the permanent decision pursuant to §230.44(1)(a), Stats., and adds DMRS as a necessary party.

The Commission wishes to clarify the scope of its review of the permanent decision under §230.44(1)(a), Stats. Such review is limited to the issue of whether the transaction satisfies the criteria set forth in the relevant statute and administrative rules. *Ford v. DHSS & DP*, 82-0243-PC, etc., 6/9/83; *Miller v. DHSS*, 81-137-PC, 10/2/81, *Stasny v. DOT*, 79-217-PC, 1/12/81. As relevant here, the review would be limited to determining whether Warren was qualified to perform the work of the PA 4 position after customary orientation, and whether the subject PA 4 and PA Sup 2 positions are in the same or counterpart pay ranges. It is not possible to conclude from the available information whether Warren was qualified to perform the work of the PA 4 position to which she was involuntarily transferred, and this issue presumably will be addressed at hearing.

B. Constructive Demotion under §230.44(1)(c), Stats.

Warren argues that the permanent decision constitutes a constructive demotion over which the Commission has jurisdiction under §230.44(1)(c), Stats. Respondent disagrees.

Respondent contends that the PA Sup 2 and PA 4 positions are in counterpart pay ranges, within the meaning of §ER-MRS 1.02(4), Wis. Adm. Code, the permanent action constitutes a "transfer," within the meaning of §ER-MRS 1.02(33), Wis. Adm. Code, and *not* a "demotion," within the meaning of §ER-MRS 1.02(5), Wis. Adm. Code. Pertinent portions of §ER-MRS 1.02, Wis. Adm. Code, are shown below:

> **(4)** "Counterpart pay ranges" means pay ranges or groupings of pay ranges in different pay schedules which are designated by the [DER] to be at the same level for the purposes of determining personnel transactions.

> **(5)** "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.
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> **(15)** "Lower class" means a class assigned to a lower pay range.
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> **(16)** "Lower pay range" means the pay range which has the lesser pay range dollar value maximum when comparing pay ranges not designated as counterparts.
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> **(33)** "Transfer" means 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.

Respondent's argument and the dissenting opinion ignore the considerable body of precedent where subject matter jurisdiction has been found even if the personnel transaction in question clearly did not fit the explicit definition of a cognizable matter. *See, e. g., Watkins v. Milwaukee Co. Civil Service Comm.*, 88 Wis. 2d 411, 276 N. W 2d 775 (1979) (alleged coerced resignation appealable under statute providing for appeals of discharges). The Commission also has determined that it has jurisdiction to review certain constructive demotion claims even though the employer did not denominate the transaction as a demotion. *See, Juech v. Weaver,* Wis. Pers. Bd., 1/13/72 (removal of supervisory duties for perceived performance deficiencies, followed by a downward reclassification cognizable as a constructive demotion) and *Cohen v. DHSS,* 85-0214-PC, 2/5/87 (transfer to a less prestigious position but at the same classification and pay range would not be cognizable as a constructive discharge, but with the additional allegation that the duties of the new position warranted a lower classification, the case was allowed to go to hearing to determine if the additional allegation was true and if a constructive discharge thereby occurred). *Also see Mirandilla v. DVA,* 82-0189-PC, 7/21/83 (removal of supervisory duties and loss of supervisory add-on appealable under §230.44(1)(c), Stats., as a constructive reduction in base pay); *Rodgers v. DOC,* 98-0094-PC, 1/27/99 (nominal written reprimand cognizable under s. 230.44(1)(c), Stats., as a constructive suspension, where the appointing authority considered it as equivalent to a one day suspension for purposes other than salary – i.e., for purposes of progressive discipline, etc.).

In *Cohen*, the employee was removed from his position as Director of the Bureau of Social Security Disability Insurance (hereafter, Bureau Director) to a position as Director of the HMO/AFDC Project (hereafter, Project Director). Both positions were classified the same and,

accordingly, had the same pay range. Respondent first argued that there was no concept of constructive demotion, an argument rejected by the Commission (pp. 2-3, *Cohen, Id.*), citing the *Mirandilla* case. The Commission specifically noted that it had jurisdiction over constructive demotion claims and defined such claims as having "the legal effect of a demotion even though the action is not denominated as such" (*Cohen*, p. 5).

The administrative code provisions in existence at the time of the *Cohen* decision also included definitions. The terms "counterpart pay ranges" (then found in ER-Pers. 1.02(2)[16]), "demotion" (old ER-Pers 17.01[17]), "lower class" (old ER-Pers 1.02(8)[18]), "lower pay range" (old ER-Pers 1.02(9)[19]), and "transfer" (old ER-Pers 15.01[20]) were defined substantively the same as today. In *Cohen* this same respondent conceded that if it were found that Cohen's position should be at a lower classification then a demotion occurred. (*Cohen*, pp. 4-5: "The Department concedes that if the HMO/AFDC Project Director position was erroneously classified and should have been allocated to a pay range 18 or lower that the appellant would have been demoted.") Respondent did not argue in *Cohen* that the potential of a different classification but within the same or counterpart pay range would not be recognized as a demotion.

The Commission holds here that Warren's constructive demotion claim should be allowed to go forward to hearing where the permanent decision appears to have been taken for disciplinary reasons, *and* where the transaction involves traditional earmarks of a demotion.

The Commission (including the dissent) agree that the permanent decision appears to have been taken for disciplinary reasons, based on the information available to date and upon drawing all inferences in Warren's favor as we must do in context of the present motion. In the

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[16] The 1983 text of §ER-Pers 1.02(2) defined counterpart pay ranges as meaning "pay ranges or groupings of pay ranges in different pay schedules which are designated by the administrator to be at the same level for the purposes of determining personnel transactions."

[17] The 1983 text of §ER-Pers 17.01 defined demotion as meaning "the permanent appointment of an employe with permanent status in one class to a position, for which the employee is qualified to perform the work after customary orientation provided for newly hired workers in such positions, in a lower class than the highest position currently held in which the employee has permanent status in class."

[18] The 1983 text of §ER-Pers 1.02(8) defined lower class as meaning "a class assigned to a lower pay range.

[19] The 1983 text of ER-Pers 1.02(9) defined lower pay range as meaning "the pay range which has the lesser pay range dollar value maximum when comparing pay ranges not designated as counterparts."

[20] The 1983 text of ER-Pers 15.01 defined transfer as meaning "the permanent appointment of an employee to a different position assigned to a class having the same or counterpart pay rate or pay range as a

present case, Warren has lost her supervisory position under unusual and suspect circumstances. She was in a PASup 2 position when she received the equivalent of a 3-day suspension for threatening a co-worker. The Commission upheld the suspension finding that just cause existed and the degree of discipline imposed was not excessive (Case No. 98-0146-PC). Based on the information available to date, an inference exists that respondent is now attempting to impose a more excessive form of discipline for reasons already considered in connection with the 3-day suspension. Most troubling in this regard is respondents' admission that no new incidents have occurred since Warren's return to work on June 28, 2000.

Furthermore, the permanent decision involves traditional earmarks of a demotion in that she lost her civil service status as supervisor and the non-supervisory position has a lower pay range maximum than did her supervisory job. The tangible negative impact on her future pay due to the lower pay-range ceiling is analogous to the downward reclassification claimed in *Cohen* – i.e., the employee's salary could have remained the same but further advances would have been subject to the limitations of a lower pay range maximum. That Warren suffered no immediate loss of pay does not present a bright-line distinction to the allegation of a lower classification raised in the *Cohen* decision. Immediate loss of pay is not a necessary consequence of a downward classification, as noted in §ER 29.03(3)(e)2., Wis. Adm. Code:

> (e) The pay of regraded employes whose positions are reclassified or reallocated to a lower class shall be determined as follows
>
> 2. Regraded employees who have permanent status in the new class shall continue to be compensated at their present rate of pay. If the present rate of pay exceeds the pay range maximum, it shall be red circles and continued under the provisions of §ER29.025.

In *Kelley v. DILHR,* 93-0208-PC, 2/23/94, a constructive demotion claim properly was rejected where there was no indication that the transfer was imposed for disciplinary reasons. The Commission notes that in *Kelley*, the *Cohen* case was summarized (p. 3) as standing for the proposition that a constructive demotion requires both an intent to discipline the employee *and* a movement of the affected employee to a position that is ultimately determined to have a lower classification than the employee's original position. This reference to *Cohen* must be read in the

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class to which any of the employee's current positions is assigned. The employee must be qualified to perform the work after customary orientation provided for newly hired workers in such positions."

context of the situation before the Commission in *Kelley*. In the latter case there was no allegation of a disciplinary motive and no change in pay range. A change in classification is one but not the only type of change in civil service status sufficient to sustain a constructive demotion claim.

Respondent also cites *Ramsden v. DHSS*, 92-0826-PC, 2/25/93, as authority that the Commission lacks jurisdiction to hear appeals of transfers. (See brief dated 12/18/00, pp. 2-3.) However, similar to *Cohen*, the case must be read in context. Specifically, Ramsden was transferred to a different position in the same classification without any indication that the transfer was taken for disciplinary reasons.

Respondent cites *Miller v. DHSS*, 87-0209-PC, 2/8/89, as standing for the proposition that the Commission lacks jurisdiction here. (See brief dated 12/18/00, p. 2). As indicated by respondent, the Commission in *Miller*, found that it lacked jurisdiction to consider a constructive demotion claim raised as a fourth step grievance under §230.45(1)(c), Stats. The Commission, however, specifically noted that it could have jurisdiction over a constructive demotion claim under §230l.44(1)(c), Stats., but such claim could not be heard because it was filed untimely. (*Miller*, p.6)

CONCLUSIONS OF LAW

1. The appellant has the burden to establish that the Commission has subject matter jurisdiction over the matters raised in the appeal.

2. The appellant failed to meet her burden on the first hearing issue relating to the temporary decision.

3. The appellant met her burden on the second hearing issue relating to the permanent decision.

4. The Commission has jurisdiction over the permanent decision raised under §§230.44(1)(a) and (c), Stats.

5. DMRS is a necessary party to the permanent decision raised under §230.44(1)(a), Stats.

ORDER

Respondent's motion to dismiss is granted as to the first hearing issue and denied as to the second hearing issue. The DMRS Administrator is added as a party with respect to the issue under §230.44(1)(a), Stats. The statement of the hearing issues is revised as shown below:

> 1. Whether the decision by respondents DHFS and DMRS to permanently transfer the appellant from her supervisory position to a non-supervisory position was contrary to the civil service code (subch. II, ch. 230, Stats., and the administrative rules issued thereunder).
>
> 2. Whether respondent DHFS' decision to permanently remove the appellant from her supervisory position and place her in a non-supervisory position constitutes a constructive demotion, within the meaning of §230.44(1)(c), Stats., and if so, whether just cause existed for the action.

Dated: November 12, 2001 STATE PERSONNEL COMMISSION

JUDY M. ROGERS, Commissioner

JMR000147Arul1.43

ANTHONY J. THEODORE, Commissioner

Dissenting Opinion

Appellant has the burden to show that the Commission has subject matter jurisdiction over this appeal. I agree with the majority here except as to their conclusion that the Commission has subject matter jurisdiction over Issue 2 pursuant to §230.44(1)(c), Stats.

Although appellant, who is represented by counsel, does not specifically argue that her involuntary transfer qualifies as a constructive demotion pursuant to §230.44(1)(c), Stats., she makes this argument by implication when she points out that (1) the pay range maximum of the PA 4 classification is lower than the pay range maximum of her former PASup 2 classification, and (2) that the PA 4 position is not a supervisory position.

An administrative body like the Commission has only those powers expressly conferred or 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). As a consequence, any expansion of the Commission's jurisdiction, such as that urged here, must be carefully and critically scrutinized.

The Wisconsin courts and the Commission have recognized the concept of a constructive personnel action. *See, e.g., Watkins v. Milwaukee Co. Civil Service Comm.*, 88 Wis.2d 411, 276 N.W.2d 775 (1979). In *Cohen v. DHSS*, 84-0072-PC, etc., 2/5/87, the Commission held that the term "constructive demotion" means "a personnel action that has the legal effect of a demotion even though the action is not denominated as such." In *Cohen*, the Commission went on to state as follows:

> 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 held previously.
>
> 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.

In *Davis v. ECB*, 91-0214-PC, 6/21/94, the Commission further explained that, " .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."

The legal effect of a demotion then is the assignment of the employe to a position in a lower classification, whether in fact or in effect. Since appellant's PA 4 position and former PASup 2 positions are, because they are assigned to counterpart pay ranges, presumed to be at comparable levels for classification purposes,[21] it would be appellant's burden to show that factors exist here which overcome this presumption.

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[21] "Lower class (classification)" means a class assigned to a lower pay range. §ER-MRS 1.02(15), Wis. Adm. Code. "Lower pay range" means the pay range which has the lesser pay range maximum when comparing pay ranges **not designated as counterparts.** (emphasis added) §ER-MRS 1.02(16), Wis. Adm. Code.

Here, appellant argues that her PA 4 position should be regarded as a position in a lower classification than her former PASup2 position because it is not assigned supervisory responsibilities. Appellant cites no factual or legal authority for this argument. This is not a situation where the incumbent remains in a position and the supervisory duties of the position are removed. *See, e.g., Juech v. Weaver,* Wis. Pers. Bd., 1/13/72; *Mirandilla v. DVA*, 82-0189-PC, 7/21/83. In most cases, given the current structure of the state civil service classification system, the removal of supervisory duties from a position would effectively cause a reduction in the classification level of the position. Under the present fact situation, in contrast, appellant was appointed to a different non-supervisory position. It is not reasonable to assume that a supervisory position necessarily merits classification at a higher level than a non-supervisory position and, in fact, such a conclusion is in conflict with the realities of the state classification system, i.e., there are many non-supervisory positions classified at higher levels than supervisory positions. Appellant has not offered any other basis for concluding that appellant's PA 4 position merited classification at a lower level than her former PASup 2 position.

Appellant's second argument is that she was effectively appointed to a position in a lower classification since the pay range maximum of her PA 4 position was lower than the pay range maximum of the PASup 2 position. The inquiry here, as determined by the Commission in *Cohen, supra,* focuses on whether an action has the **legal effect** of a demotion, not on whether an action has an adverse effect which has some attributes of a demotion. The legal effect of a demotion, as set forth in §ER-MRS 1.02(5), Wis. Adm. Code, is the "permanent appointment of an employe to a position in a lower class." A "lower class" means a class (classification) assigned to a lower pay range (§ER-MRS 1.02(15)), and the definition of "lower pay range" specifically excludes counterpart pay ranges, to which appellant's PA 4 and PASup 2 positions are assigned. Appellant's appointment to a position in a counterpart pay range with a lower pay range maximum did not have the legal effect of a demotion since it did not involve appointment to a position in a lower class.

The majority relies to a significant extent on the Commission's holding in *Cohen, supra.* In *Cohen*, the appellant was moved from one position to another and asserted that this action was a constructive demotion since the duties and responsibilities of the second position merited classification at a lower level. The Commission relied in its decision in *Cohen* on the administrative

code definition of demotion, i.e., "permanent appointment. .to a position **in a lower class"** (emphasis added), to determine whether the subject action had the legal effect of a demotion. The Commission examined whether the duties and responsibilities of the second position actually justified a lower class (classification) as that term is defined in the administrative code. The Commission agreed with the respondent (*Cohen, supra*, at p. 5) that any alleged loss of status, job security, or job satisfaction was not relevant to the issue of whether the action had the legal effect of a demotion, i.e., that the only issue was whether the second position merited a lower classification, i.e., assignment to a lower pay range, than the original position. The majority's reliance here on appellant's loss of supervisory status as a justification for concluding that the subject action should be regarded as a constructive demotion is misplaced and in conflict with Commission precedent.[22]

The majority also relies heavily, in finding that the Commission has subject matter jurisdiction over Issue 2 pursuant to §230.44(1)(c), Stats., on its conclusion that appellant's appointment to the PA 4 position was taken in an effort to discipline appellant. However, as the Commission explained in *Cohen, supra*, a constructive demotion requires a finding of disciplinary intent **as well as** a finding that the subject action had the legal effect of a demotion. No such legal effect is present here and, as a result, one of the requirements for a finding of constructive demotion has not been satisfied.

Appellant has failed to show that there is any reason to consider the subject transaction as anything other than an involuntary transfer,[23] which is not appealable pursuant to §230.44(1)(c), Stats., The subject action does not qualify as a layoff, suspension, reduction in base pay, or discharge within the meaning of §230.44(1)(c), Stats. Although appellant attempts to argue that appellant's "removal" from her PASup 2 position qualifies as a "discharge," this argument is unavailing since a discharge within the meaning of §230.44(1)(c), Stats., requires a separation from

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[22] It should be noted that this is a civil service appeal, not an equal rights action where an inquiry into whether the petitioner experienced a significant change in responsibility or status may be appropriate in determining whether he or she had suffered an adverse employment action. *See, e.g., Crady v. Liberty Nat'l Bank & Trust Co.*, 993 F.2d 132, 136 (7th Cir. 1993); *Simpson v. Borg-Warner Automotive, Inc.*, 196 F.3d 873, 81 FEP Cases 850 (7thCir. 1999); *Sharp v. City of Houston, et al.*, 164 F.3d 923, 933, 78 FEP Cases 1779 (5th Cir. 1999).

[23] "Transfer" means 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. §ER-MRS 1.02(33), Wis. Adm. Code.

state service and it is undisputed that appellant remained employed by the state in a PA 4 position after the involuntary transfer.

In my opinion, the Commission does not have subject matter jurisdiction over Issue 2 pursuant to §230.44(1)(c), Stats.

Dated: November 12, 2001

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson