STATE OF WISCONSIN

PERSONNEL COMMISSION

M. JUDITH ARCAMO,
Complainant,

v.

President, UNIVERSITY OF WISCONSIN SYSTEM,
Respondent.

Case No. 01-0025-PC

RULING ON RESPONDENT'S MOTION TO DISMISS

NATURE OF THE CASE

This case involves an appeal filed April 4, 2001, relating to the termination of appellant's probationary period following a promotion, and restoration to a vacant position pursuant to §ER-MRS 14.03(1), Wis. Adm. Code. Respondent filed a motion to dismiss on May 11, 2001, and both parties have filed briefs. The following findings are based on apparently undisputed facts, and are made for the sole purpose of ruling on this motion.

FINDINGS OF FACT

1. Prior to September 11, 2000, appellant was employed in a PA2 (Program Assistant 2) position in the classified civil service at UWM (University of Wisconsin-Milwaukee), in which she had attained permanent status in class. The position was located in the Roberto Hernandez Center in the College of Letters and Science. Effective September 11, 2000, she was promoted to a PA3 position in the classified civil service in the Health Restoration Department of the School of Nursing.

2. Pursuant to §ER-MRS 13.03(2), Wis. Adm. Code, complainant was required to serve a minimum six-month probationary period in the PA3 position.

3. Appellant did not pass this probationary period, and respondent restored her to a PA2 position in the College of Letters and Science at the Center for International Education (CIE) at the pay rate she formerly had in the PA2 position at the School of Nursing, effective March 5, 2001.

4. The position summary section of the position description (PD) for the CIE position is shown below:

> The position provides clerical and administrative support services for the [CIE's] Overseas Programs and Partnership (OPP) team, Director, and Faculty Advisory Committee (FAC). The incumbent of the position must provide a complete range of clerical and administrative support services, possess excellent organizational skills, and interact in a helpful and knowledgeable manner with faculty, staff, international and domestic students, and the general public. Special emphasis is placed on the ability to communicate effectively with people from different cultural backgrounds. Individual must exercise good judgment, discretion, and initiative and is expected to develop a thorough working knowledge of the goals, objectives, policies, procedures and programs of the OPP, CIE and UWM.

5. The PD for the CIE position ends with the following section:

> Skills, Knowledge, or Experience Needed to Work Effectively:
> - Prior experience in a study abroad program (preferably UWM administered or familiarity with UWM procedures for study abroad)
> - Experience working in an office setting. Knowledge of standard office practices and procedures.
> - Excellent computer skills, including word processing, spreadsheet and database use and typing speed and accuracy.
> - Knowledge of network-based office software and systems.
> - Proficiency in the use of standard computer applications (web search, e-mail, Microsoft Word, Access, Excel and UWM System IBM 3270)
> - Intercultural sensitivity and ability to interact effectively with people from a wide variety of cultural backgrounds and English Language proficiency levels.
> - Skill in proofreading documents and ability to draft letters and documents.
> - Ability to handle several tasks at once and function well in a busy office environment.
> - Excellent verbal and written communication skills, including telephone etiquette and ability to deal diplomatically with people.
> - Strong organizational and time-management skills.
> - Ability to organize and retrieve file records.

6. In the appeal appellant filed with this Commission on April 4, 2001, as later supplemented by an assertion in her brief in opposition to the motion to dismiss, she alleges that:

a. Her former PA2 position in the College of Letters and Science was vacant at the time she was restored to the PA2 position in the CIE.

b. During her probationary period she requested restoration to her former position, which was then vacant, but that respondent refused her request.

c. The position to which she was restored (PA2, CIE) was not similar to the job she had held prior to her promotion, in that "[i]ts primary requirement was familiarity with the study abroad program (see *Skills, Knowledge, or Experience*—Exhibit 9), but Ms. Arcamo had no such experience." Appellant's Brief, p. 3.

d. The Assistant Dean of the College of Letters and Sciences "abused his authority by ordering Arcamo not to report for work March 5, 6, and 7, 2001, in violation of s. 230.35, Wis. Stats."[1]

OPINION

I. Applicable Standard of Judgment for Present Motion

The general rules for deciding motions of this nature were discussed in *Phillips v. DHSS,* 87-0128-PC-ER, 3/15/89; affirmed, *Phillips v. Wisconsin Personnel Commission,* 167 Wis. 2d 205, 482 N. W 2d 121 (Ct. App. 1992); as follows:

> For the purpose of testing whether a claim has been stated the facts pleaded must be taken as admitted. The purpose of the complaint is to give notice of the nature of the claim; and, therefore, it is not necessary for the plaintiff to set out in the complaint all the facts which must eventually be proved to recover. The purpose of a motion to dismiss for failure to state a claim is to test the legal sufficiency of the claim. Because the pleadings are to be liberally construed, a claim should be dismissed only if it is quite clear that under no circumstances can the plaintiff recover.' The facts pleaded and all reasonable inferences from the pleadings must be taken as true, but legal conclusions and unreasonable inferences need not be accepted.
>
> A claim should not be dismissed unless it appears to a certainty that no relief can be granted under any set of facts that plaintiff can prove in support of his allegations." (citations omitted) Slip opinion, p. 7

Additionally, since this matter is an administrative proceeding, pleading requirements are less stringent than in a judicial proceeding, and pleadings should be even more liberally construed than in a judicial proceeding. *See Oakley v. Commissioner of Securities,* 78-0066-PC (10/10/78);

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[1] It is undisputed from the papers filed on this motion that appellant was fully paid for these three days.

73A CJS Public Administrative Law and Procedure §122; *Association of Career Executives (ACE) v. DOA*, 92-0238-PC, 1/12/93; *Loomis v. Wisconsin Personnel Commission*, 179 Wis. 2d 25, 30, 179 Wis. 2d 25 (Ct. App. 1993).

Appellant appears to contend that this case should not be decided on what she characterizes as a motion for summary judgment. However, respondent has not submitted any affidavits or other evidentiary material. The Commission will resolve this motion by accepting as true (with the caveats identified in *Phillips)* all of appellant's relevant factual assertions, so the disposition of this case amounts to a ruling on a motion to dismiss either for failure to state a claim or for lack of subject matter jurisdiction, similar to the circumstances in *Balele v. Wis. Personnel Commission*, 223 Wis. 2d 739, 748, 589 N. W 2d 418 (Ct. App. 1998):

> Thus, although the commission considered "matters outside the pleadings," the DER/DMRS motions were still decided on the grounds that Balele's allegations had failed to state a claim, not on the basis that he had failed to establish a genuine factual dispute. We conclude that the commission's consideration of matters beyond Balele's complaint does not preclude it from granting a motion to dismiss for failure to state a claim. Because the commission dismissed Balele's complaints for failure to state a claim, we need not decide here to what extent the commission's summary dispositions in other contexts may permissibly parallel the summary judgment procedures authorized by §802.08, Stats., for actions in circuit court.

See also Balele v. DOT, 00-0044-PC-ER, 10/23/01.

II. Nature of the Present Dispute

The appellant was removed from the PA3 position prior to passing probation and, accordingly, she did not achieve permanent status in class as a PA3. (*See*, §230.28(2), Stats., "A probationary employee shall gain permanent status unless terminated by the appointing authority prior to the completion of his or her probationary period.")

The appellant contends the Commission has jurisdiction over respondent's decision by operation of §ER-MRS 14.03(1), Wis. Adm. Code, the text of which is shown below:

> PROMOTION WITHIN THE SAME AGENCY In accordance with §230.28(1), Stats., the promoted employee shall be required to serve a probationary period. At any time during this [probationary] period the appointing authority may remove the employe from the position to which the employe was promoted without the right of appeal and shall restore the employe to the employe's former position or a similar position and former rate of pay, as determined under § ER 29.03(7)(a). Any other removal, suspension without pay, or discharge during the probationary period shall be subject to §230.44(1)(c), Stats. If the position to which the employe shall be given restoration rights has been abolished, the employe shall be given consideration for any other vacant position in the same or counterpart pay range for which the employe is determined to be qualified by the appointing authority to perform the work after being given the customary orientation provided for newly hired workers. If no such vacant position exists, the employee shall be treated as if he or she had been restored to the position held prior to promotion and the provisions for making layoffs under ch. ER-MRS 22 shall apply.

It is clear from the above-noted rule that the appellant retained her permanent status in class as a PA2, after she was terminated from her probationary employment within the same agency.

The potential jurisdiction here, as noted in the above rule, is under §230.44(1)(c), Stats., the text of which is shown below in pertinent part:

> (1) [T]he following are actions appealable to the commission
>
> (c) *Demotion, layoff, suspension or discharge.* If an employee has permanent status in class the employee 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.

Restoration transactions not meeting the requirements of the administrative rule are deemed under the rule as: "Any other removal, suspension without pay, or discharge during the

probationary period subject to §230.44(1)(c), Stats." *See*, for example, *Phelps v. DHSS*, 95-0193-PC, 12/19/85 and *Stevens v. DNR*, 92-0691-PC, 5/27/94.

There is no dispute that the appellant has been restored to a PA2 position at her former rate of pay. The dispute is whether she was restored to an appropriate position.

III. Respondent Was Not Required to Restore Appellant to Her Prior PA2 Position

On its face, the above rule gives the appointing authority the option of restoring the employee to his or her "former position *or* a similar position." *Id.* (emphasis added). However, appellant contends that this interpretation would render superfluous much of the latter part of the rule. Her argument is noted below (Appellant's brief, p. 8, emphasis in original):

> The respondent's interpretation renders superfluous much of the latter half of the regulation which discusses the contingency of the abolition of the employee's former position and 'other vacant position[s].' Read in its entirety, the intent of ER-MRS 14.03(1) is **first to return the employee to his/her former position and only if that is not possible to assign the employe to a similar position.** This interpretation is supported by *DuPuis v.* DHSS, 90-0219-PC (9/3/92).

Appellant does not explain how the *DuPuis* case supports her interpretation, nor does the Commission see a connection. Ms. DuPuis transferred from a nursing position at the Wisconsin Resource Center (WRC) in which she had attained permanent status in class to a position at Fox Lake Correctional Institution (FLCI) where she was required to serve a probationary period. Both positions were within the same agency when the transfer occurred but by the time she was terminated before successfully completing probation, the legislature had given the supervision of FLCI to a different agency. The question was whether she had restoration rights as a transfer within same agency as she otherwise would have had if supervision of FLCI had remained the same. The Commission concluded that Ms. Dupuis had restoration rights as if the supervision of FLCI had remained the same and that she "was entitled to have been restored to her previous position at WRC (or transferred to a like position)," p. 3, decision. Nowhere in the decision does the Commission state that Ms. Dupuis' first entitlement was to her old position if it was vacant.

The Commission disagrees with appellant's interpretation of this rule. The rule first defines the employee's restoration rights as being "to the employee's former position or a similar position." The rule further provides that if "the position to which the employee shall be given

restoration rights has been abolished" the employee shall be considered for "any other vacant position in the same or counterpart pay range." Appellant equates the phrase "[i]f the position to which the employe shall be given restoration rights has been abolished" to mean if her position were no longer vacant. Clearly this interpretation is inconsistent with the language used in the rule. Since the rule uses the term "former position" in its first part, it must be inferred that if the drafter had meant to refer to the former position when addressing the situation where there had been an abolishment of the position, he or she simply would have said "former position" again, rather than to have used the terminology "[i]f the position to which the employe shall be given restoration rights." *Id. See Nelson v. McLaughlin,* 211 Wis. 2d 460, 496, 565 N. W 2d 123 (1997) ("where the legislature uses similar but different terms in a statute, particularly within the same section, it is presumed that the legislature intended such terms to have different meanings." [citations omitted]) Also, the rule should be interpreted "in a manner that avoids an absurd or unreasonable result," *id.,* and so that no part of it is superfluous. *Murphy v. Midwest Hardwoods, Inc.,* 183 Wis. 2d 205, 515 N. W 2d 487 (Ct. App. 1994).

The appellant contends that only her interpretation of the rule is consistent with her "right of mandatory transfer under the collective bargaining agreement" which would allow her to exercise "her mandatory right to transfer back to her former position." Appellant's brief, pp. 8-9. This argument begs the question of whether the interpretation causes an absurd result and inappropriately attempts to graft into the rule an extraneous union contract provision. Laying to one side the question of whether appellant's contention about the effect of the contract is correct, to the extent that she is arguing there was a violation of the contract, that issue is outside the Commission's jurisdiction. *See* s. 111.93(3), Stats., *Gandt v. DOC,* 93-0170-PC, 1/11/94 (As a result of the effect of § 111.93(3), the Commission lacks jurisdiction concerning an issue relating to transfer where a collective bargaining agreement addresses that issue.)

Left for consideration is whether the PA2 position in CIE was a "similar position," within the meaning of §ER-MRS 14.03(1), Wis. Adm. Code. The Commission was unable to reach a majority agreement on this question as noted in the separate opinions appearing after the joint signature page.

IV Wage Issue

Appellant also argues that her supervisor did not have the authority to have ordered her not to work for a few days prior to the termination of her probationary employment and her restoration to the PA 2 position in the CIE (appellant was in effect suspended with pay). The basis for the Commission's jurisdiction over this appeal, referred to in §ER-MRS 14.03(1), Wis. Adm. Code, is §230.44(1)(c), Stats. This provides for appeals to the Commission of certain disciplinary actions. However, it does not include paid suspensions. Therefore, the Commission lacks authority to consider this claim. *See Passer v. DHSS,* 90-0033-PC, 5/16/90.

CONCLUSIONS OF LAW

1. Based on the undisputed facts, and interpreting appellant's contentions liberally and in the light most favorable to the appellant, this appeal fails to state a claim as to appellant's allegation that respondent had a duty to have restored her to her former PA2 position in the College of Letters and Science.

2. The Commission lacks subject matter jurisdiction over appellant's claim that respondent violated the civil service code by suspending her with pay.

ORDER

1. Respondent's motion to dismiss is granted in part and denied in part. So much of this appeal as relates to appellant's claim that respondent had a duty under the civil service code to have restored her to her former PA2 position at the College of Letters and Science, is dismissed for failure to state a claim

2. So much of this appeal as relates to appellant's claim that respondent violated the civil service code by suspending her with pay on March 5, 6, and 7, 2001, is dismissed for lack of subject matter jurisdiction.

3. So much of this appeal as relates to appellant's claim that respondent violated §ER-MRS 14.03(1), Wis. Adm. Code, by not restoring her to a "similar position" is to be scheduled for an evidentiary hearing due to the lack of a majority opinion granting respondent's motion.

Dated this 14 day of December, 2001

JMR/AJT:010132Crul2

JUDY M. ROGERS, Commissioner

ANTHONY J. THEODORE, Commissioner

Chairperson McCallum did not participate in the consideration of this case.

Separate Opinion of Commissioner Theodore

Appellant contends the position at the CIE to which she was restored was not "similar" to her former position at the College of Letters and Science, because its primary requirement involves an area with which appellant had no familiarity, and therefore respondent violated the rule by its handling of this personnel transaction. Appellant's brief, p. 3.

In *Stevens v. DNR*, 92-0691-PC, 5/27/94, the Commission held as follows:

> In view of the apparent intent of this administrative code provision [§ER-MRS 14.03(1)] to encourage state employees to seek state intra-departmental promotional job opportunities by providing a safety net in instances of failures, the Commission concludes that the position to which an employee is restored should be nearly alike to the original position in all essential respects. This conclusion is consistent both with the synonyms offered for the term "similar" in *Words and Phrases,* Permanent Edition, i. e., "same," "like," "comparable," "equivalent," "alike," and "corresponding;" and with the conclusions reached in *Gonzalez v. Ohio Bureau of Employment Services,* 68 Ohio App. 2d 243, 429 N. E. 2d 448 (Ct. App. 1980) (the term "similar" does not require that the duties of the new position be identical, as it is sufficient that they be nearly alike); *Johnson v. Goodyear Tire and Rubber Co.,* 790 F. Supp. 1516 (E. D. Wash. 1992) (two jobs are "similar" if nearly but not exactly the same or alike); *Mathis v. USPS,* 865 F. 2d 232 (Fed. Cir. 1988) (positions are "similar" if they involve related or comparable work that requires the same or similar skills—if experience in a position demon-

> strates the knowledges, skills, and abilities required to perform the work of the other job). Pp. 3-4

The Commission went on to hold that two positions in identical pay ranges were not similar where one involved 40% law enforcement and the other did not.

In the instant case, the respondent characterizes appellant's argument as resting on not having one of eleven characteristics listed in the skills, knowledges, and abilities section of the position description of the position in the Center for International Education, and contends that "[t]he critical point is that the two positions are 'similar' by virtue of both being classified as PA 2 positions within an academic unit." Respondent's reply brief, p.4. Merely being in the same classification would not be sufficient to constitute these positions as "similar," consistent with *Stevens.* However, any difference between the two positions in this case does not appear to be as clear cut as in *Stevens,* where one position involved 40% law enforcement activities, and the other did not. But, while the circumstances in *Stevens* provide an example of dissimilar positions under §ER-MRS 14.03(1), Wis. Adm. Code, that case does not hold that the difference between positions must be as pronounced as it was there to violate the "similar position" requirement in the rule. Also, in *Stevens* the Commission cited *Mathis v. USPS,* 865 F. 2d 232, 234 (Fed. Cir. 1988), for the following proposition: "positions are 'similar' if they involve related or comparable work that requires the same or similar skills—if experience in a position demonstrates the knowledges, skills, and abilities required to perform the work of the other job." *Stevens* at p. 4. In the instant case, it may be that the requirement in the "skills, knowledge, or experience" set forth in the position description for the CIE job (Appellant's Exhibit 9) of "prior experience in a study abroad program," *id.,* is not so significant as to make that position dissimilar to the appellant's old job. However, in *Phillips* the Commission held that on a motion to dismiss for failure to state a claim:

> the pleadings are to be liberally construed, [and] a claim should be dismissed only if 'it is quite clear that under no circumstances can the plaintiff recover.' The facts pleaded and all reasonable inferences from the pleadings must be taken as true, but legal conclusions and unreasonable inferences need not be accepted.
>
> . A claim should not be dismissed unless it appears to a certainty that no relief can be granted under any set of facts that plaintiff can prove in support of his allegations." (citations omitted) Page 7

The position description for the CIE position not only lists "[p]rior experience in a study abroad program" as a "Skill, Knowledge, or Experience Needed to Work Effectively," it also includes activities such as analyzing requests for assistance, responding to inquiries, and carrying out special assignments and projects as requested by the Overseas Program" that may require such substantive knowledge in order to perform effectively. In light of the need to liberally construe appellant's allegations and to accept her factual assertions as true, I am unable on this record to conclude as a matter of law that the two positions in question are or are not "similar." Therefore, I would deny respondent's motion to dismiss this claim.

ANTHONY J. THEODORE, Commissioner

Separate Opinion by Commissioner Rogers

It is my opinion that the PA2 position in the CIE is "a similar position," within the meaning of §ER-MRS 14.03(1), Wis. Adm. Code, to the appellant's prior PA2 position in the College of Letters and Science. Accordingly, I would grant respondent's motion to dismiss in its entirety.

The Commission has looked to federal case law for guidance in defining the term "a similar position." The specific excerpt from *Stevens v. DNR*, 92-0691-PC, 5/27/94, is noted in Commissioner Theodore's opinion. A review of the facts of the referenced federal cases, I believe, does not support as expansive an interpretation he suggests.

The law at issue in *Gonzalez v. Ohio Bureau of Employment Services*, 68 Ohio App. 2d 243, 429 N.E. 2d 448 (Ct. App. 1980), is similar to the administrative code at issue in here. The Ohio law provided (in pertinent part) that " a person in the classified service may be transferred to a similar position in another office department, or institution having the same pay and similar duties " Mr. Gonzales was transferred from a position as Manager of the Findlay Office of the Ohio Bureau of Employment Services (first job) to a Rural Manpower Specialist position (second job) in the Migrant Rest Center. A job audit was conducted of the second job and it was concluded that the duties Mr. Gonzales performed were not the same as the duties he was expected to perform on paper. The court found that if the duties he actually performed were re-

duced to writing then the second job would have been down graded. The court concluded that these were not similar positions.

The law at issue in *Johnson v. Goodyear Tire and Rubber Co.*, 790 F. Supp. 1516 (E.D. Wash. 1992), pertained to rights of women who return to work after pregnancy leave. The Washington (state) law provided (in pertinent part) that an employer "shall allow a woman to return to the same job, or a similar job of at least the same pay." Mrs. Johnson worked as Office Manager of Goodyear's Commercial Tire Center (first job) when she took pregnancy leave. Goodyear filled the position when she was on leave. Goodyear created a new Office Manager position (second job) at the retread plant. Both jobs required comparable proficiency in clerical skills such as bookkeeping, data processing and filing (finding #49). The court noted that the two positions were nearly the same in terms of jobs skills required, but differed in "one crucial aspect;" job security. Indeed, Mrs. Johnson's second job was eliminated less than 5 months after she returned to work.

The law at issue in *Mathis v. USPS*, 865 F. 2d 232 (Fed. Cir. 1988), pertained to the requirement that an employee have 1 year of continuous service in the "same or similar" position as a prerequisite to appeal an adverse personnel action. Mr. Mathis worked 21 years for the postal service as a Special Delivery Messenger (first job), but was removed after an altercation with another employee and reassigned to a position as a Distribution Clerk (second job). He wished to appeal this removal. The administrative hearing board dismissed the appeal holding that the two jobs were not similar positions because the first job dealt primarily with delivering mail whereas the second dealt primarily with sorting mail. The court reversed stating that the critical fact was that both positions involved handling the mail and the skills required to perform both jobs were closely related. On pages 9-10 of the decision, the Court specifically rejected the administrative hearing board's decision, as noted below:

> The Board apparently deemed it critical that a special delivery messenger delivered the mail outside the Post Office after it had been sorted, but a distribution clerk worked solely inside the Post Office and separated both incoming and outgoing mail and then distributed it inside the facility. Those differences in the nature of the work performed in the two jobs, however, are not inconsistent with their being "similar positions." In each position the critical fact is that the petitioner handled the mail. The fact that he did that handling in different physical locations and in different steps of the mail distribution process did not alter the

> fundamental character of the work he did, which was sufficiently closely related in the two jobs to make those positions "similar."

The situation here is unlike that in *Gonzalez, id,* in that the duties appellant performs warrant classification at the PA2 (and not a lower) level. The present case is similar to circumstances in the *Johnson* case in that both PA2 positions require comparable proficiency in clerical skills which, after all, is the "fundamental character" of the positions mentioned in the *Mathis* case. The *Johnson* court reached a different conclusion but based on a job-security factor not present here.

The appellant cites to *one* difference between the PA2 positions as noted below (June 12, 2001 brief, p. 3):

> Its (the CIE position) primary requirement was familiarity with the study abroad program (see *Skills, Knowledge, or Experience* – exhibit 9), but Ms. Arcamo had no such experience.

The above statement is unsupported by the information submitted by the parties. The position summary of the CIE PD (last sentence) notes that the incumbent "is expected to develop a thorough working knowledge of the programs." It does not say that a person hired must know the programs before being hired. Further, the section referred to by the appellant as "Skills, Knowledge, or Experience" leaves off the important remaining portion of the full title "Skills, Knowledge, or Experience *Needed to Work Effectively*" (emphasis added). Studying abroad is not a prerequisite because a stated alternative was "familiarity with UWM procedures for study abroad," which could be learned on the job as contemplated in the position summary section of the PD.

I am not unmindful that in the context of the present motion the pleadings are to be liberally construed and that the facts pleaded and all reasonable inferences must be taken as true. The appellant's assertion, however, that the CIE position required knowledge of the study abroad program *prior to hire* is an unreasonable inference from the PD language. Since unreasonable inferences need not be accepted, *Phillips, id.*, I would reject the appellant's argument and grant summary judgment on this claim.

JUDY M. ROGERS, Commissioner