

CHRISTIL JACKSON,
Appellant,

v.

**President, UNIVERSITY OF WISCONSIN
SYSTEM,**
Respondent.

RULING
ON
MOTION TO
DISMISS

Case No. 02-0007-PC

This case, filed on January 8, 2002, is before the Commission on respondent's motion to dismiss. Respondent contends that certain portions of the appeal are untimely; that the Commission's jurisdiction is superseded by §111.93(3), Stats., for matters specifically governed by a collective bargaining agreement; and that the Commission lacks subject matter jurisdiction under §230.44(1), Stats., over training, job assignment and wage issues, as well as over appeals from paid suspensions. Appellant has also raised a general objection to one of respondent's submissions. The facts recited below are made solely to resolve the present motion. They are undisputed unless specifically noted to the contrary.¹

FINDINGS OF FACT

1. The appellant was employed as a Program Assistant 1 (PA1) at the Peck School of the Arts in the Department of Theater and Dance and the University of Wisconsin-Milwaukee (UWM) from April 5, 1999, until February 15, 2002.

2. Appellant's position was a part of the Administrative Services bargaining unit represented by the Wisconsin State Employees Union and, at all relevant times, a collective bargaining agreement was in effect.

¹ The Commission regrets the delay in issuing this ruling. Due to the State's ongoing budget difficulties, the Commission has in effect been understaffed in its professional positions by 20% since May of 2000, 40% since February of 2002, and 60% by January of 2003.

3. Appellant obtained permanent status in class in her position after having completed a six-month probationary period. Appellant's last wage increase was on October 8, 2000. (Sirinek Affidavit, ¶5)

4. On July 13, 2001, respondent informed appellant that she was being placed on a Concentrated Performance Evaluation (CPE) for six months.

5. Karen Young and Tim Borchert are Human Resource Specialists in UWM's Department of Human Resources. They are responsible for processing transfer requests at UWM.

6. Persons employed by respondent who hold the same position title and are in the same employing unit as a job opening at UWM are eligible for mandatory transfer based on seniority and pursuant to the collective bargaining agreement.

7. If a position is not filled by mandatory transfer, the supervisor of the department with the vacancy has the option of interviewing any permissive (non-mandatory) applicants or waiting to have a list of permissive transfer candidates forwarded along with those names that have been certified for the vacancy from the database maintained by the Department of Employment Relations.

8. If a position is not filled by a mandatory transfer candidate, it may be filled by a permissive transfer, reinstatement, or a certified candidate. (Young 2nd Affidavit, ¶2)

9. Persons who are not currently employed within the state civil service are not eligible for a transfer to other civil service positions. (Borchert Affidavit, ¶24)

10. If UWM's Department of Human Resources receives a transfer request from a person employed by respondent and holding the same position title as a job posting during the week-long period when a job opening is posted on its Job Transfer Hotline, Department of Human Resources staff assumes the request is for a mandatory transfer.

11. Respondent posted a job opening on its Job Transfer Hotline for a PA1 position in the **Center for Addiction and Behavioral Health Research** in UWM's School of Social Welfare on December 14, 2001.

12. Appellant submitted a "Request for Classified Transfer/Demotion" for the **Center for Addiction and Behavioral Health Research** position to respondent's human resources staff. [Exhibit A to Borchert Affidavit] The request was received on December 17th. The request form included the following information regarding the transfer and demotion process:

For WSEU positions, WSEU employees who are in the same employing unit as the vacancy, who are in the same classification as the vacancy, and who have completed their original probationary period in the classification will be referred first, by seniority, on a mandatory basis. Next, all other WSEU employees in the UW System who are in the same classification and have completed their original probationary period will be referred, by seniority, on a mandatory basis. Finally, all other transfer candidates, plus voluntary demotion and reinstatement candidates, will be referred on a non-mandatory basis. For non-WSEU positions, all employees will be referred on a non-mandatory basis.

13. On December 21st, respondent informed appellant via email (Exhibit B to Borchert Affidavit) that she would not be considered for transfer to the **Center for Addiction and Behavioral Health Research** position:

Employees in the same employing unit and classification as posted positions *are considered mandatory transfers*.

However, because you are currently on a Concentrated Performance Evaluation, you will not be considered for referral. If you have any further questions or concerns, please contact (Emphasis added.)

14. Lynda Braatz, Program Manager 2 at UWM's Center for Addiction and Behavioral Research, issued a memo on January 8, 2002, to Mr. Borchert of the Department of Human Resources, stating, in part:

I have been informed that Christil Jackson has expressed interest as a mandatory transfer for the Program Assistant 1 position that the Center for Addiction and Behavioral Health Research currently is seeking to fill.

In accordance with section 7/1/1 of the union contract, I will not accept this *mandatory* transfer because of Ms. Jackson's current concentrated performance evaluation plan that has determined that she cannot perform the work of a Program Assistant 1 in a satisfactory manner. (Emphasis added.)

15. Elizabeth Bolt, Assistant Dean for UWM's College of Health Sciences, sent a letter (Exhibit D to Borchert Affidavit) to appellant on January 11th notifying her that her request for a *mandatory* transfer to two PA1 positions, including the position in the **Center for Addiction and Behavioral Health Research**, would not be accepted because she was on a CPE.

16. By letter dated January 13th, (Exhibit F to Borchert Affidavit) appellant notified Ms. Bolt that her transfer requests were not just for mandatory transfers:

Regarding your letter to me dated January 11, 2002 you are mistaken. You apparently assume and/or were misinformed that my transfer requests were for mandatory transfers only. Since they were not, your comments in your January 11, 2002 letter are irrelevant. You have yet to explain why my transfer requests were not honored.

17. Ms. Bolt responded to appellant by letter (Exhibit F to Borchert Affidavit) dated January 15th. The letter read:

The purpose of my letter of January 11th was to let you know that your name had been referred to us by Human Resources as a *mandatory* transfer and that the supervisors for the two positions were not accepting you as a mandatory transfer based on Section 7/1/1 of the union contract.

If you are interested in being considered for these positions as a non-mandatory transfer, you should inform Human Resources of your interest. (Emphasis added.)

18. By memo (Exhibit G to Borchert Affidavit) dated January 17th, appellant advised Assistant Dean Bolt that her previous transfer request had not only been a request for mandatory contractual transfer and that "Human Resources was so notified."

19. On January 23rd, appellant filed another "Classified Transfer/Demotion" request with the Human Resources Department for a PA1 position in UW-M's **Academic Opportunity Center**. (Exhibit A to Young Affidavit) The Human Resources Department confirmed receipt of the request on January 25th. (Exhibit B to Young Affidavit)

20. By letter (Exhibit C to Young Affidavit) dated January 28th, Karen Young informed appellant that the “Department of **Academic Opportunity Support**” has declined to interview you as a mandatory transfer based on Section 7/1/1 of the union contract.”

21. Appellant responded by fax (Exhibit D to Young Affidavit) dated January 31, 2002, to Ms. Young. Appellant wrote:

In your January 28, 2002 memorandum you fail to cite grounds for denying my mandatory transfer. Therefore, I should be allowed a mandatory transfer. But even if there were grounds, you can not prevent my permissive transfer. Please confirm that I will be considered for a permissive transfer.

22. On February 1st, respondent informed appellant that she had failed to meet the requirements of her CPE and that it was unnecessary for her to continue to report to work. Thereafter, appellant did not report to work.

23. Respondent continued to pay appellant through February 15, 2002.

24. By letter (Exhibit H to Borchert Affidavit) dated February 5, 2002, respondent informed appellant that she was being discharged from employment, effective February 15, 2002, for “failure to meet departmental performance standards.” The letter provided, in part:

As this discharge is not disciplinary in nature, you may be eligible to be reinstated to State of Wisconsin service for the period of five (5) years. .

25. On February 8, 2002, Ms. Young sent a referral of interested individuals to the **Academic Opportunity Center** for the vacant PA1 position there. Ms. Young did not include Ms. Jackson’s name on this list because Ms. Young “was aware that the Peck School of the Arts had terminated her employment and employees not currently employed in the state civil service are not eligible for a transfer.” (Young Affidavit ¶18) Ms. Young did include the name of someone other than appellant as a permissive transfer candidate on this list. (Young 2nd Affidavit, ¶4)

26. On February 20, 2002, Mr. Borchert sent a referral of the names of interested individuals to the **Center for Addiction and Behavioral Health Research**

for the PA1 position there. Mr. Borchert did not include Ms. Jackson's name on this list because "she was no longer eligible for transfer because of her termination from UWM." (Borchert Affidavit ¶24)

27. As of April of 2002, appellant had not applied for reinstatement.
28. Appellant filed a letter of appeal with the Personnel Commission on January 8, 2002, and filed an amended letter of appeal on February 21st.
29. On or about March 15, 2002, the **Academic Opportunity Center** and the **Center for Addiction and Behavioral Health Research** put their recruitment efforts for the two PA1 positions on hold due to hiring reductions instituted by respondent.

CONCLUSIONS OF LAW

1. Appellant's allegations that respondent improperly denied her requests for permissive transfer to the PA1 position in the Center for Addiction and Behavioral Health Research and to the PA1 position in the Academic Opportunity Center were timely filed.
2. Any authority the Commission has to review appellant's allegations that respondent improperly denied her requests for permissive transfer is not superseded by §111.93(3), Stats.
3. The appellant's claim relating to the alleged failure to provide her with training/orientation is either outside of the Commission's jurisdiction or was untimely filed.
4. The Commission lacks subject matter jurisdiction over appellant's allegation relating to job duties and responsibilities.
5. Any authority the Commission has to review appellant's wage level is superseded by §111.93(3), Stats.
6. The Commission lacks the authority to review respondent's decision to pay the appellant during the period from February 1 through 15, 2002.

OPINION

Although the appellant filed her original appeal² with the Personnel Commission on January 8, 2002, she filed an "Amended Appeal/Complaint" on February 21, 2002, that reads, in relevant part:

1. The respondent, UWM, and named individuals, through illegal action or abuse of discretion violated the following specifications ss. 230.046, 230.09, 230.12, 230.15(3), and ER-MRS 15, ER 2, and ER 44 of the Wisconsin Administrative Code.
2. In violation of 230.09, 230.12 Wis. Stats., and ER 2, [Matthew] Sirinek and [LeRoy] Stoner ordered Ms. Jackson to carry out duties and responsibilities beyond those required by her [PA1] position [in the School of the Arts] including duties and responsibilities that were part of a higher grade position. The respondents denied Ms. Jackson compensation paid for equal or substantially similar work.
3. In violation of 230.046 Wis. Stats., and ER 44, Sirinek and Stoner denied Ms. Jackson career-related training and educational activities and customary orientation provided for a newly hired worker in the position.
4. In violation of 230.15(3) Wis. Stats., and ER-MRS 15, [on] November 28, 2001, Timothy Borchert denied Ms. Jackson the right to transfer to a Program Assistant 1 position in the School of Education at UWM. [On] December 21, 2001, ShaRon Williams denied Ms. Jackson the right to transfer to a Program Assistant 1 position in the [School] of Social Welfare, Center for Addiction and Behavior Health Research. [On] January 28, 2002, Karen Young, of UWM's Department of Human Resources informed Ms. Jackson that the Academic Opportunity Center of UWM refused to interview her, thereby interfering with, and denying Ms. Jackson the right to transfer.
5. In violation of 230.35 Wis. Stats., Sirinek, Stoner, and Scudder, ordered Ms. Jackson not to report to work [from] February 1, 2002 through February 15, 2002.

In her brief in response to respondent's motion, appellant "clarified" the timeliness of her allegations by stating: "On information and belief, Ms. Jackson contends that

²Appellant's initial filing, received by the Commission on January 8, 2002, was identified by her as a "complaint." However, in light of the information found within the document, the Commission construed the document as both an appeal (the case presently before the Commission) and a complaint of discrimination/retaliation (Case No. 02-0006-PC-ER). The only matter that is subject to respondent's motion is the appeal, Case No. 02-0007-PC.

UWM continued its interference [with her right to transfer] by withholding her transfer request until after her termination notice [on] February 1, 2002.”

Respondent asserts the Commission should dismiss appellant’s claims because portions of them are untimely; because the Commission’s jurisdiction is superseded by §111.93(3), Stats., for matters specifically governed by a collective bargaining agreement; and because the Commission lacks subject matter jurisdiction under §230.44(1), Stats., over appellant’s allegations related to training, work assignments and wages.³ Finally, in a letter dated February 26, 2002, respondent asserts the Commission does not have jurisdiction over paid suspensions and requests dismissal of that portion of the appeal relating to respondent’s directive that appellant not report to work from February 1st through 15th should be dismissed.

The time limit for filing an appeal with the Commission under §230.44(1), Stats., is established in §230.44(3), Stats.:

An appeal filed under this section may not be heard unless the appeal is filed within 30 days after the effective date of the action, or within 30 days after the appellant is notified of the action, whichever is later. . . .

Therefore, for an appeal that first reached the Commission on January 8, 2002, the earliest day in the actionable period was December 9, 2001. Appeals from events occurring prior to December 9th would not be timely.

I. Transfer requests

Appellant’s allegations are that respondent improperly denied her requests for *permissive* transfer to the PA1 position in the Center for Addiction and Behavioral Health Research and to the PA1 position in the Academic Opportunity Center.⁴

³ In its filing dated February 22, 2002, respondent also objected to appellant’s action of simultaneously filing a complaint and an appeal based on the same allegations. However, respondent expressly reserved “its right to dispute the validity of the practice in the future” so the Commission does not address this point in this ruling.

⁴ Although the appellant did not initially specify the basis for her appeal of the respondent’s “transfer” actions, appellant did so in her initial response to respondent’s motion:

Respondent contends that some of these allegations are untimely. If appellant requested a transfer and the request was denied on November 28 (or on any day prior to December 9), then the appeal of that denial would be untimely. But if the request was made on November 28 and denied on December 9th or later, then it would be timely.

The appellant was initially notified of the decision not to permit mandatory transfer to the Center for Addiction and Behavioral Health Research position on December 21st. To the extent there was a decision on her request for a permissive transfer, it was made no earlier than December 21st. Therefore, the appeal was timely as to that transaction. The decision relating to appellant's request to transfer into the Academic Opportunity Center position occurred even later, on or after January 28, 2002. Respondent's timeliness objection to that portion of the appeal arising from the two transfer requests is rejected.

Respondent also argues that §111.93(3), Stats., acts to supersede the Commission's authority to review the appellant's transfer allegations. That subsection reads:

[I]f a collective bargaining agreement exists between the employer and a labor organization representing employees in a collective bargaining unit, the provisions of that agreement shall supersede the provisions of the civil service and other applicable statutes . . . related to wages, fringe benefits, hours and conditions of employment whether or not the matters contained in those statutes . . . are set forth in the collective bargaining agreement.

The Commission has previously held that it lacks the authority to review *contractual* transfer decisions pursuant to §111.93(3), Stats. *Gandt v. DOC*, 93-0170-PC, 1/11/94. Therefore, to the extent the appellant sought review of the decisions not

While UWM repeatedly insisted Ms. Jackson's requests for transfer were under the bargained mandatory system, she was not seeking a mandatory [contractual] transfer, but a permissive transfer as specified under ER-MRS 15. Appellant was asked to clarify her allegations regarding the Academic Opportunity Center request because the appellant's fax sent on January 31st references both mandatory transfer and permissive transfer. Her response (¶8 of her submission filed on July 25, 2002) reiterated that her underlying "Request for Classified Transfer/Demotion" submitted on January 23, 2002, was "not a request for a mandatory transfer."

to transfer appellant, pursuant to the collective bargaining agreement and on a mandatory, seniority basis, the bargaining agreement supersedes any authority by the Commission over such decisions. However, the effect of §111.93(3) does not extend into the area of filling a vacancy that was not filed by the exercise of a mandatory transfer right under the collective bargaining agreement. *Jorgensen v. DOT*, 90-0298-PC, 6/12/91

Respondent cites no authority for the proposition that §111.93(3) supersedes the Commission's authority over permissive transfer decisions and the Commission is unaware of any such authority.

On page 7 of its submission dated April 22, 2002, respondent also articulates what amounts to a motion for summary judgment:

UWM should . . . prevail because UWM did not abuse its discretion as a matter of law with regard to either the Social Welfare or Academic Opportunity Center Positions. . . . UWM did not exercise, let alone abuse, discretion. In processing the permissive transfer applications at issue, the Human Resources Department followed its rules and was not able to forward Ms. Jackson's application as a result of those rules.

Respondent relies on various affidavits and supporting documents as the basis for this motion.

The Commission may summarily decide a case when there is no genuine issue as to any material fact and the moving party is entitled to judgment as matter of law. *Balele v. Wis. Pers. Comm.*, 223 Wis.2d 739, 745-748, 589 N.W.2d 418 (Ct. App. 1998). Generally speaking, the following guidelines apply. The moving party has the burden to establish the absence of any material disputed facts based on the following principles: a) if there are disputed facts, but they would not affect the final determination, they are immaterial and insufficient to defeat the motion; b) inferences to be drawn from the underlying facts contained in the moving party's material should be viewed in the light most favorable to the party opposing the motion; and c) doubts as to the existence of a genuine issue of material fact should be resolved against the party moving for summary judgment. See *Grams v. Boss*, 97 Wis.2d 332, 338-9, 294 N.W.2d 473 (1980) and *Balele v. DOT*, 00-0044-PC-ER, 10/23/01. The non-moving

party may not rest upon mere allegations, mere denials or speculation to dispute a fact properly supported by the moving party's submissions. *Balele, id.*, citing *Moulas v. PBC Prod.*, 213 Wis.2d 406, 410-11, 570 N.W.2d 739 (Ct. App. 1997). If the non-moving party has the ultimate burden of proof on the claim in question, that ultimate burden remains with that party in the context of the summary judgment motion. *Balele, id.*, citing *Transportation Ins. Co. v. Huntziger Const. Co.*, 179 Wis.2d 281, 290-92, 507 N.W.2d 136 (Ct. App. 1993)

The Commission has determined that it is appropriate to apply the above guidelines in a flexible manner, after considering at least the following five factors (*Balele, id.*, pp. 18-20):

1. *Whether the factual issues raised by the motion are inherently more or less susceptible to evaluation on a dispositive motion.* Subjective intent is typically difficult to resolve without a hearing whereas legal issues based on undisputed or historical facts typically could be resolved without the need for a hearing.
2. *Whether a particular complainant could be expected to have difficulty responding to a dispositive motion.* An unrepresented complainant unfamiliar with the process in this forum should not be expected to know the law and procedures as well as a complainant either represented by counsel or appearing *pro se* but with extensive experience litigating in this forum.
3. *Whether the complainant could be expected to encounter difficulty obtaining the evidence needed to oppose the motion.* An unrepresented complainant who either has had no opportunity for discovery or who could not be expected to use the discovery process, is unable to respond effectively to any assertion by respondent for which the facts and related documents are solely in respondent's possession.
4. *Whether an investigation has been requested and completed.* A complainant's right to an investigation should not be unfairly eroded.

5. *Whether the complainant has engaged in an extensive pattern of repetitive and/or predominately frivolous litigation.* If this situation exists it suggests that use of a summary procedure to evaluate his/her claims is warranted before requiring the expenditure of resources required for hearing.

The Commission now turns to applying the above factors to this case. The present motion does not focus on subjective intent and instead relies upon undisputed facts. Respondent, rather than appellant knows the particular steps it took in terms of considering the possibility of allowing appellant to permissively transfer into one of the two positions in question. The appellant is not represented by an attorney, although she does have assistance from a non-lawyer. There is no indication in the case file that the appellant has engaged in any form of discovery that would might relate to the respondent's motion for summary judgment. This matter is before the Personnel Commission as an appeal under §230.44(1), Stats., rather than as a complaint of discrimination. The companion complaint (Case No. 02-0006-PC-ER) has been held in abeyance pending a ruling on this motion, so there has been no investigation conducted as yet. There has been no showing that complainant has engaged in an extensive pattern of repetitive and/or predominately frivolous litigation. The Commission also notes that respondent's motion for summary judgment was embedded in a document that raised a variety of other defenses to appellant's allegations.

Given the circumstances of the present case, as outlined above, the Commission is unwilling to consider further the respondent's motion for summary judgment.⁵

⁵ Even if the Commission did address the merits of respondent's motion for summary judgment, the motion would be denied. Respondent's affidavit shows that Ms. Young decided not to include appellant's name on the February 8th referral list for the Academic Opportunity Center position, because appellant was "not currently employed" by respondent, even though it is undisputed that appellant remained on respondent's payroll through February 15th. By the time respondent actually sent the referral list for the Center for Addiction and Behavior Health Research position on February 20th, appellant's employment with respondent had ended, but the Commission cannot determine if the respondent abused its discretion by not sending the referral by February 15th, when complainant was still employed. In its brief filed on April 22, 2002, page 8, respondent argued:

II. Training

Appellant claims she was denied "career-related training and educational activities and customary orientation" provided for newly hired workers.⁶ Respondent's motion to dismiss this claim is based on two theories. First, respondent argues that because appellant was hired in April of 1999, any orientation should have been completed in 1999 and, therefore, the allegation is untimely. Respondent also argues that the Commission lacks subject matter jurisdiction over an appeal, brought under §230.44, Stats., arising from an alleged lack of training opportunities.

The Commission's authority to hear appeals from certain personnel transactions is conferred by statute. The only provisions that are arguably relevant to the appellant's training claim are found in §230.44(1), Stats., which reads, in pertinent part:

Except as provided in par. (e), the following are actions 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).

(b) *Decision made or delegated by secretary.* Appeal of a personnel decision under s. 230.09(2)(a) or (d) or 230.13(1) made by the secretary or by an appointing authority under authority delegated by the secretary under s. 230.04(1m).

Appellant might argue that she was not officially terminated on February 8, 2002, and thus, Human Resources should have forwarded her name to the Academic Opportunity Center. The Personnel Commission should not be swayed by this argument. It would bring about an absurd result if UWM was required to forward a candidate's name at a point in time when it definitively knew that the candidate would not have the right to be forwarded, or ultimately hired, by the following week. Moreover, it would penalize UWM for "doing the right thing" by providing Ms. Jackson two weeks worth of financial notice about her termination, as opposed to terminating her employment on February 1, 2002, as it was entitled to do.

The above argument is an inappropriate basis for resolving a motion for summary judgment.

⁶ Appellant describes the claim as follows in her response to the motion, p. 3: "Ms. Jackson's claim is that UWM deliberately withheld training for the classification in which she had permanent status, and UWM then terminated her in part based on her lack of training."

(c) *Demotion, layoff, suspension or discharge.* . . .

(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.

The decision not to provide certain training or orientation to the appellant is attributable to the respondent University of Wisconsin, rather than to either the Administrator of the Division of Merit Recruitment and Selection (§230.44(1)(a), Stats.) or the Secretary of the Department of Employment Relations (§230.44(1)(b), Stats.). Appeals under §230.44(1)(c), Stats., are limited to the specific acts listed (demotion, layoff, suspension, reduction in base pay and discharge). Because denial of training/orientation is not one of the enumerated actions, it is not reviewable under §230.44(1)(c), Stats. *Anand v. DHSS*, 81-438-PC, 1/8/82

The only remaining option is §230.44(1)(d), Stats., and in order to fit within that provision, the personnel action must be “related to the hiring process.” That process does not extend indefinitely. In *Board of Regents v. Wisconsin Personnel Commission*, 103 Wis. 2d 545, 309 N.W. 2d 366 (1981), the Court of Appeals held that the period of “the hiring process” covered by §230.44(1)(d) does *not* extend to include the end of the probationary period. Appellant’s probationary period only extended until October of 2000.

The jurisdictional limitations of §230.44(1)(d) interact with the 30 day filing period in §230.44(3), so as to require dismissal of appellant’s claim relating to the alleged failure to provide her with training/orientation. To the extent the appellant’s claim relates to a failure to provide an adequate orientation to appellant, it was not filed within the 30 day actionable period that preceded January 8, 2002, when the appeal was filed. And to the extent the claim relates to the failure to provide appellant with training after her orientation, the allegations would not relate to the hiring process so the Commission would lack subject matter jurisdiction. Given this interplay of the 30 day time limit and the Commission’s jurisdiction under §230.44(1)(d), appellant’s allegation relating to the lack of training/orientation must be dismissed.

III. Job duties and responsibilities

In her amended appeal, appellant alleges she was ordered to carry out duties and responsibilities beyond those required by her position description, including duties and responsibilities that should have been classified at a level higher than PA1. Appellant recast this allegation in her response brief when she explained:

[Appellant's] complaint is not an appeal regarding assignment of job duties as in *Kienbaum v. UW*, 79-246-PC, 4/25/80, but an abuse of discretion regarding classification. In the same vein, [appellant] has not claimed inaccuracies in position standards or pay range. Her allegations are about a misuse of the classification system.

In *Kienbaum, id.*, the appellant objected to work assignments that were alleged to be outside the scope of the class specification for that particular classification. The Commission concluded that it lacked authority to consider an appeal arising from the assignment of duties.

The appellant denies that she is seeking to appeal the assignment of job duties and contends that she is appealing "an abuse of discretion regarding classification" and "a misuse of the classification system."

State employees in the classified civil service who believe their positions have undergone both a logical and gradual change so that their duties are better described at a higher classification level⁷ may initiate a reclassification request. If that request is ultimately denied by the Secretary of the Department of Employment Relations or, on a delegated basis, by the employing agency, the employee may appeal the decision to the Personnel Commission pursuant to §230.44(1)(b), Stats. Appellant has not provided any information tending to show that she requested reclassification of her position and/or that such a request was formally denied by either the Department of Employment Relations or, on a delegated basis, by her employing agency. Similarly, the appellant has failed to present any information tending to show that the alleged

⁷ See §ER 3.01, Wis. Adm. Code.

“abuse of discretion” related to the hiring process as required in order for the Commission to assert jurisdiction under §230.44(1)(d).

Therefore, the Commission finds that it does not have statutory authority over the subject of job duties and responsibilities as argued by appellant and this allegation must be dismissed.

IV. Wages

The appellant alleges she was denied equal compensation for equal or substantially similar work. Respondent argues that the Commission lacks jurisdiction because the collective bargaining unit specifically governs wages. Section 111.93(3) provides:

[I]f a collective bargaining agreement exists between the employer and a labor organization representing employees in a collective bargaining unit, the provisions of that agreement shall supersede the provisions of civil service and other applicable statutes . . . related to wages, fringe benefits, hours and conditions of employment whether or not the matters contained in those statutes, rules and policies are set forth in the collective bargaining agreement.

The issue of wages is a subject of bargaining. Therefore, the collective bargaining agreement supersedes any authority the Commission might otherwise have to hear an appeal under §230.44(1), Stats., over appellant’s rate of pay. *Heath & Mork v. DOC & DER*, 94-0550-PC, 12/22/94; *Zier & Fogelberg v. DHSS*, 83-0057, 0067-PC, 9/16/83; *Tedford v. DHSS*, 81-455-PC, 3/4/82.

IV. Paid suspensions

Appellant’s final allegation arises from respondent’s action of ordering her not to work from February 1st through the 15th, even though she was paid as if she had been working. Respondent contends the Commission lacks subject matter jurisdiction. (Respondent’s letter dated February 26, 2002)

In *Passer v. DHFS*, 90-0003-PC, 5/16/90, the Commission determined that a suspension with pay is not an appealable transaction under §230.44(1)(c). Appellant argues that respondent has mischaracterized her claim:

UWM incorrectly characterizes Ms. Jackson's complaint as "paid suspension." The respondents misunderstand. Ms. Jackson complains of an illegal act by UWM: namely, paying her for not working. She is not claiming she was suspended, in fact quite the contrary. A paid suspension would imply some disciplinary act. Ms. Jackson did not allege, nor is she aware of any disciplinary intent by UWM. (Appellant's brief, p. 4)

Appellant's mere characterization of respondent's conduct as an "illegal payment" does not give the Commission the authority to review respondent's action. If the action was not a paid suspension but was actually some other personnel action, it is still up to the appellant to show how it fits into one of the categories of personnel actions that may be appealed to the Commission. Appellant has not done so and the Commission is unaware of any reason why respondent's action is not properly described as a paid suspension. The Commission has no general statutory authority to hear appeals of "illegal payments" or of any "illegal act."

V. Appellant's motion to disregard

On April 29, 2002, appellant filed a motion to disregard respondent's reply brief and addenda. The addenda consisted of several affidavits and exhibits. Appellant explained her objection as follows:

The respondent's reply brief with addenda and an additional addendum of April 23 are attempts to try the case on its merits in summary fashion without even answering the complaint. At a minimum, the affidavits and other documents attached to the reply brief should be disregarded as they represent attempts to introduce factual evidence and what amounts to testimony by material witnesses without cross examination and due process.

The submission of the affidavits and other addenda are highly prejudicial. The appellant does not accept their contents as true, and puts the respondent to proof of their contents and authenticity. . . .

If questions of jurisdiction depend on factual evidence, the proper procedure under ch. 227 is to hold the evidentiary hearing, and then rule on the jurisdictional question.

As noted above, the Commission may consider dispositive motions. *Balele v. Wis. Pers. Comm.*, 223 Wis.2d 739, 745-748, 589 N.W.2d 418 (Ct. App. 1998). However, the Commission has already determined that it will not consider respondent's motion for summary judgment under the circumstances of the present case. Therefore it is unnecessary to discuss further the appellant's "motion to disregard."

ORDER

The various motions in this matter are granted in part and denied in part as set forth above. The only claims that remain are those arising from the respondent's conduct relating to the appellant's requests for permissive transfer to the PA1 positions at the Center for Addiction and Behavior Health Research and the Academic Opportunity Center.

Dated: February 19, 2003

STATE PERSONNEL COMMISSION


ANTHONY J. THEODORE, Commissioner

KMS:020007Arul2.1

Commissioner Theodore is the sole sitting commissioner; the other two commissioner positions are vacant. Therefore, Commissioner Theodore is exercising the authority of the Commission. See 68 Op. Atty. Gen. 323 (1979).