

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

KURT SUTHEIMER, Appellant,

vs.

**Secretary, DEPARTMENT OF ADMINISTRATION & Director,
OFFICE OF STATE EMPLOYMENT RELATIONS**, Respondents.

Case No. 612
No. 62920
PA(adv) – 16

Decision No. 30932-A

Appearances:

Kurt Sutheimer, P.O. Box 259286, Madison, WI 53725, appearing on his own behalf.

Mark Saunders, Deputy Legal Counsel, P.O. Box 7864, Madison, WI 53707-7864, appearing on behalf of the Department of Administration.

David J. Vergeront, Attorney at Law, P.O. Box 7855, Madison, WI 53707-7855, appearing on behalf of the Office of State Employment Relations.

RULING ON MOTION FOR SUMMARY JUDGMENT

This matter is before the Commission on Respondents' motion to dismiss for failure to state a claim upon which relief can be granted or, alternatively, motion for summary judgment. The appeal, timely filed with the Personnel Commission 1/ on September 23, 2003, arises from a change in Appellant's employing agency and changes to his position description resulting from the implementation of 2003 Wisconsin Act 33 that abolished the Department of Electronic Government (DEG). The parties have agreed to the following issues:

1. Were the Appellant's responsibilities after August 24, 2003 effectively at a lower classification level than prior to that date? If so, did the Respondents intend to cause this result and effectively discipline the Appellant?

2. Was the Appellant the subject of a layoff action? If so, was the layoff for just cause?
3. Was the Appellant involuntarily transferred? If so, did the transaction satisfy the criteria set forth in the relevant statutes and administrative rules?

1/ The Personnel Commission was abolished pursuant to 2003 Wisconsin Act 33 and the authority over this matter was transferred to the Wisconsin Employment Relations Commission. The same legislation reorganized the executive branch so that the former Secretary of the Department of Employment Relations is now the Director of the Office of State Employment Relations.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

FINDINGS OF FACT

1. Kurt Sutheimer, the Appellant herein, was appointed to Position No. 325843, a Career Executive position, as an Information Technology Management Consultant (ITMC) with the Division of Information Technology Services (DITS), Department of Administration (DOA) effective May 26, 1998.

2. The hire was authorized by 1997 Wisconsin Act 27, the 1997-1999 Wisconsin State budget. The Act created the TEACH [Technology for Educational Achievement in Wisconsin] Board in October of 1997 and also authorized DITS “to purchase educational technology materials, supplies, equipment or contractual services from orders placed with DOA by the TEACH Board on behalf of school districts . . . and the UW System.”

3. While Mr. Sutheimer’s position was classified at the Information Technology Management Consultant level, its working title was TEACH Acquisition Specialist. The position description provided the following Position Summary and Goals:

Manage the TEACH acquisition process with the emphasis on cost effective and timely acquisitions of highly complex mainframe and/or LAN/WAN hardware, software, services and supplies for school districts and technical colleges statewide. This position is responsible for: development and implementation of acquisition policies and procedures which must address the unique and complex

technological environment of 426 school districts, 12 CESA administrators and 16 technical colleges statewide. These policies and procedures must cover the entire spectrum of acquisition planning, forecasting, bid/proposal development, evaluation processing, and contract administration. Responsibilities also include development of information technology specifications as well as requests for bid/proposals for large complex hardware, software, services and maintenance; development of evaluation criteria and appointment of evaluation committee; evaluation of vendor bids and proposals; administering the appeals process; vendor contract negotiations; and monitoring for contract compliance. This position also works with the DOA's procurement team to ensure TEACH customers' requirements are addressed in enterprise procurement activities.

In order to ensure cost-effective acquisitions and successful negotiation of contracts, this position requires a detailed working knowledge of the following: TEACH customers' mainframe and compatible systems, LAN/WAN technology, the operational software systems and data storage/access hardware for this type of environment, information technology architectural directions, systems, business management, and academic software. This position reports to the Director of Administrative Services and has considerable discretion in establishing objectives, priorities and deadlines under general administrative review.

20% A. Responsible for developing and implementing unique state purchasing policies and procedures for information technology equipment and software under the state statutes. . . .

40% B. Responsible for managing the development of technical specifications for IT equipment, software and consulting contracts. . . .

25% C. Responsible for managing the selection of the IT equipment or software.

15% D. Responsible for developing and maintaining relationships with 426 school districts, 12 CESA administrators, 16 technical college IT directors and the UW system to determine procurement requirements and directions.

Appellant's official position description did not change until the transaction that is the subject of this appeal.

4. By letter dated November 20, 2001, Mr. Sutheimer was advised that as a result of the creation of the Department of Electronic Government (DEG) in 2001 Wisconsin Act 16, the biennial budget bill for 2001-2003, he and his position had been moved from DOA to the new agency. The letter was signed by the Secretary of DEG and it read, in part:

This letter confirms your official movement to the Department of Electronic Government. The transfer of both you and your position is a result of 2001 Act 16, the biennial budget bill, which created the new agency on August 30, 2001.

Mr. Sutheimer's position description, position number, employment status and hourly rate of pay were not affected by this move.

5. By letter dated February 11, 2002, Mr. Sutheimer received written confirmation that the organizational structure of DEG had been changed. Appellant and his position were placed in the Procurement and Financial Management Unit of the Office of Workforce and Financial Management in DEG where his supervisor was Susan Puntillo. Mr. Sutheimer's position description, classification and position number were unchanged as a result of this movement.

6. The enactment of 2003 Wisconsin Act 33, the budget bill for 2003-2005, abolished DEG. Section 9115 of Act 33 provided, in part:

(1)(b)1. On the effective date of this subdivision, all full-time equivalent positions in the department of electronic government, except the positions occupied by the secretary, the deputy secretary, the executive assistant, and 2 division administrator positions determined by the secretary of administration, are transferred to the department of administration.

7. In late spring of 2003, in anticipation of the movement of DEG personnel to DOA, Patricia Thyse, a Human Resources Program Officer at DOA, was assigned as a human resources consultant to DEG.

8. By letter dated July 28, 2003, Marc J. Marotta, Secretary, DOA, advised Mr. Sutheimer that he and his position were being moved to DOA:

This letter confirms your official movement to the Department of Administration, Division of Administrative Services. The transfer of both you and your position is a result of 2003 Act 33, the biennial budget bill and is effective August 24, 2003. Your supervisor will be Michael Pohlman.

Mr. Pohlman held the position of Chief of the Purchasing Section of DOA's Bureau of Management Services in the Division of Administrative Services.

9. Appellant had attained permanent status in class prior to August 24, 2003.

10. Sometime subsequent to receipt of the July 28 letter, but prior to August 24, Mr. Sutheimer met with Mr. Pohlman regarding Appellant's position and job responsibilities at DOA. Mr. Sutheimer had serious concerns regarding a draft position description that was provided to him at that meeting. The language in the position description was taken from a position classified at the IS Technical Services – Senior level, which is a lower classification level than ITMC.

11. Respondent subsequently made substantial revisions to the draft position description.

12. By e-mail dated September 10, 2003, to the Appellant, Mr. Pohlman referenced discussions with Ms. Thyse and stated, "we came to the conclusion that we needed to keep your PD in line with your classification so as to not jeopardize your position."

13. Beginning August 24, 2003, Mr. Sutheimer held Position No. 325843 in the Department of Administration, Division of Administrative Services, Bureau of Management Services. Mr. Pohlman and Ms. Thysee signed off on a new position description on September 11, 2003, but the Appellant refused to sign it. Ms. Thysee had reviewed the duties set forth in this position description and concluded they were properly classified at the ITMC level. The position description reflects a working title of Acquisition Specialist and includes the following Position Summary and Goals:

This position reports to the Chief of Purchasing in the Purchasing Section of the Bureau of Management Services, Division of Administrative Services and has considerable discretion in establishing objectives, priorities and deadlines under general administrative review.

This position performs highly technical duties for the department, assisting with the IT acquisition process, with emphasis on cost effective and timely acquisitions of highly complex mainframe computer and supporting hardware and software facilities for the statewide information technology initiatives. This position is also responsible for assisting with development and implementation of acquisition policies and procedures that must address the unique and complex technological environment of mainframe computing. Some of these policies will supplement, and in some cases replace, regular state policies. These policies

and procedures must cover the entire spectrum of computing facilities acquisitions including acquisition planning, forecasting, bid/proposal development, evaluation processing, appeals processing, contract administration and disposal processes. Responsibilities also include development of information technology specifications, as well as, requests for bid/proposals for large complex mainframe hardware, software, services and maintenance (valued at over \$50 million); development of evaluation criteria and appointment of evaluation committee; evaluation of vendor bids and proposals; administering the appeals process; vendor contract negotiations; monitoring for contract compliance; and equipment disposal processing. This position works closely with the other client agencies and the Bureau of Procurement in acquisition activities. Other responsibilities for this position include providing assistance in the development of annual and long-range hardware and software budgets.

In order to ensure cost-effective acquisitions and successful negotiation of contracts, this position requires a detailed working knowledge of the following: IBM S/370 mainframe and compatible systems, the operational software systems and data storage/access hardware for this type of environment, information technology architectural direction, policies, standards and limitations set by the department.

5% A. Responsible for assisting with developing and implementing unique state purchasing policies and procedures for information technology equipment and software under the state statutes. ...

40% B. Responsible for managing the development of technical specifications for IT equipment, software and consulting contracts, including those requested under s. Ch. 16.72(8). . . .

30% C. Responsible for managing the selection of the IT equipment or software.

10% D. Assist with the responsibility for initial and ongoing negotiation of software contracts including a working knowledge of mainframe operation software, the financial and market standing of vendors and the relationship of numerous software systems to the department's customer rate for services.

10% E. Responsible for contract administration.

5% F. Other duties as assigned.

14. The Classification Specifications for Information Technology Management Consultant have remained the same at all times relevant to these proceedings. In pertinent part, the specifications state:

Inclusions:

This classification encompasses positions performing advanced level information technology consulting work which is considered to be “management” in nature as defined under s. 111.81(13), Wis. Stats. A position allocated to this classification will function as a key management policy advisor on issues related to the formulation, determination and implementation of management information policy which will require that the position be part of and privy to, confidential matters and information affecting the employer-employee relationship. Positions allocated to this classification must effectively recommend substantial policies or systems which have a significant impact on information technology operations or organization. To be included in this classification, a position must be part of an organization that has a major information technology function. Positions included in this classification would require the incumbent to possess advanced level knowledges and skills related to information technology (IT) such that they would be considered the agency subject matter expert in one or more key technical aspects of the IT function. . . .

DEFINITIONS

Positions allocated to this classification have duties and responsibilities which are broader in scope than [sic] positions allocated to the Information Systems “Consultant/Administrator” level classifications and are intimately involved, at the highest levels within the Agency/Campus or Information Technology (IT) organization, in the formulation, determination and implementation of information technology management policy relating to complex IT systems. Such activities will relate to personnel or significant financial activities, including developing policies which significantly affect information technology personnel staffing patterns or levels . . . , allocation of significant financial resources; or providing advice and assistance on IT applications and systems which may have significant impact on non-IT agency programs. . . .

15. The personnel transaction that took place in August 2003 was not an involuntary transfer or layoff.

16. There is insufficient undisputed information to determine that Appellant's duties after the August 2003 personnel transaction continue to be a best fit in the classification of Information Technology Management Consultant.

Based upon the above and foregoing Findings of Fact, the Commission issues the following

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to Sec. 230.44(1)(c), Stats.
2. Respondents have the burden to show that there are no genuine issues of material fact and that they are entitled, as a matter of law, to judgment in their favor.
3. Respondents have satisfied their burden as to Appellant's claims of layoff (issue 2) and transfer (issue 3), but not as to his constructive demotion claim (issue 1).

Based upon the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following

ORDER

Respondents' motion for summary judgment is granted in part and denied in part.

Given under our hands and seal at the City of Madison, Wisconsin, this 22nd day of June, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

Department of Administration (Sutheimer)

**MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER**

This matter is before the Commission on Respondents' motion to dismiss for failure to state a claim upon which relief can be granted or, alternatively, Respondents' motion for summary judgment. Because Respondents submitted affidavits and exhibits in support of their motion, we treat the pending motion as a motion for summary judgment.

The Commission is generally reluctant to dismiss complaints prior to an evidentiary hearing on the merits. To this end, "the complaint must be liberally construed in favor of the complainant and the motion should be granted only if under no interpretation of the facts alleged would the complainant be entitled to relief." UNIFIED SCHOOL DISTRICT NO. 1 OF RACINE COUNTY, DEC. NO. 15915-B (HOORNSTRA WITH FINAL AUTHORITY FOR WERC, 12/77) at 3; WAUSAU INSURANCE COMPANY, ET AL., DEC. NO. 30018-C (WERC 10/03) at 7, CITY OF MEDFORD, DEC. NO. 30537-B (WERC 2/04).

In DEPARTMENT OF CORRECTIONS & DEPARTMENT OF EMPLOYMENT RELATIONS (SCOTT), DEC. NO. 30767 (WERC, 1/04), the Commission adopted the summary judgment approach taken by the Personnel Commission, the Commission's predecessor for purposes of State civil service personnel appeals. In SCOTT, the Commission noted that it 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 a 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 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 that would not affect the final determination, such facts 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 BELELE V. DOT, 00-0044-PC-ER, 10/23/01. If the moving party makes a prima facie case for summary judgment, the non-moving party must show there are material facts in dispute which entitle the non-moving party to a hearing. LAMBRECHT V. ESTATE OF KACZMARCZYK, 2001 WI 25, 241 WIS. 2D 804, 623 N.W.2D 751 (2001). If the moving party fails to make out a prima facie case for summary judgment, there is no need to go further. SCHMITZ V. FIRSTAR BANK MILWAUKEE, 2003 WI 21, 260 WIS. 2D 24 (2003). 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).

It is appropriate to apply the above guidelines in a flexible manner, after considering at least the following factors that are relevant to resolution of a matter filed under Sec. 230.44, Stats., (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.* For example, 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 Appellant could be expected to have difficulty responding to a dispositive motion.* For example, an unrepresented Appellant unfamiliar with the process in this forum should not be expected to know the law and procedures as well as an Appellant either represented by counsel or appearing *pro se* but with extensive experience litigating in this forum.
3. *Whether the Appellant could be expected to encounter difficulty obtaining the evidence needed to oppose the motion.* For example, an unrepresented Appellant who either has had no opportunity for discovery or who could not be expected to use the discovery process may be unable to respond effectively to an assertion by Respondent for which the facts and related documents are solely in Respondent's possession.
4. *Whether the Appellant has engaged in an extensive pattern of repetitive and/or predominately frivolous litigation.* If this situation exists, use of a summary procedure to evaluate his/her claims may be warranted before requiring the expenditure of resources for an evidentiary hearing.

We now apply these factors to this case. Respondents' motion is directed at the three ways Mr. Sutheimer has characterized the personnel transaction in question: layoff, involuntary transfer and constructive demotion. All three of these terms are defined elsewhere in this memorandum. Since layoff and transfer do not require an analysis of subjective intent, such claims may be susceptible to resolution without a hearing. In contrast, a claim of constructive demotion requires establishing a change in the nature of the position such that it is correctly classified at a lower level and an intent to discipline. While intent to discipline is not susceptible to resolution on summary judgment, the Respondents could prevail on summary judgment if the undisputed facts demonstrate that the position remains appropriately classified at the higher level.

With respect to the other factors, the Appellant is an attorney and may be expected to know or have access to the relevant law and to understand the summary judgment process even though, currently, he is not actively engaged in the practice of law. Appellant should have access to facts and documents relating to his employment as well as a thorough understanding of the particular responsibilities that have been assigned to his position over the course of his employment. There is no indication that the Appellant engaged in discovery in this case. However, as an attorney, Appellant can be expected to know how to engage in discovery should Respondents' submissions suggest that discovery would be helpful. Finally, there has been no suggestion that Appellant has engaged in an extensive pattern of repetitive and/or predominately frivolous litigation.

Given these circumstances, we conclude that Appellant may properly be held to the requirement that, in responding to the motion for summary judgment, he demonstrate genuine issues of material facts entitling him to an evidentiary hearing on his claims. However, we will afford the Appellant some leeway because he prepared his response pro se and did not file any affidavits. Hence we will take into account the factual assertions in other documents Appellant submitted, including his initial appeal and his response to the motion to dismiss. The uncontroverted material facts that emerge from the parties' submissions on this motion have been set forth in the Findings of Fact, above.

LAYOFF ALLEGATION

The definition of "layoff" is found in Sec. ER 1.02(15) and ER-MRS 1.02(11), WIS. ADM. CODE:

"Layoff" means the termination of the services of an employee with permanent status in class from a position in a layoff group approved under s. ER-MRS 22.05, in which a reduction in force is to be accomplished.

Chapter ER-MRS 22 of the Administrative Code provides a detailed and complex procedure for identifying the layoff group, notifying the affected employees, and providing alternatives to termination from service. Approval must be granted by the Respondent Division of Merit Recruitment and Selection (DMRS) before a layoff may be implemented.

The personnel transaction at issue here did not result in a termination of Appellant's services by Respondents. He remained an employee of the State after DEG was abolished, in a full-time classified position with the same position number, albeit with a different agency. Appellant did not receive a written notice of layoff as required by Sec. ER-MRS 22.07, WIS. ADM. CODE, nor is there any indication that Appellant's position was "in a layoff group approved under s. ER-MRS 22.05," or the subject of any approval by DMRS. Hence, the Appellant's situation does not fit within the definition of "layoff" set forth in the relevant regulations.

Appellant also appears to contend that, prior to the effective date of 2003 Wis. Act 33, he was an employee of the TEACH Board and not a DEG employee, because he reported to the Executive Director of TEACH. He also contends that other TEACH staff received “at-risk” letters early in 2003 and could exercise their layoff rights, while he did not receive a similar letter and consequently could not exercise his layoff rights. We conclude that there is no genuine issue of material fact regarding the Appellant’s status as a DEG employee in a full-time equivalent DEG position, rather than as a TEACH employee, immediately prior to the effective date of 2003 Wis. Act 33 and that his position moved to DOA when the Act took effect. In support of their motion for summary judgment, Respondents have supplied an affidavit as well as appointment letters and numerous other documents showing that Appellant was never an employee of TEACH. Exhibits 10A through F show the Appellant was initially hired for a position in DOA with a working title of TEACH Acquisition Specialist, moved to DEG as a result of the legislation creating DEG in 2001 and then moved back to DOA in 2003 as a result of the most recent legislation. In contrast, the Appellant has offered nothing to substantiate a contention that he was a TEACH employee. As noted above, the Appellant may not rest upon mere allegations or speculation to dispute a fact properly supported by the Respondents’ submissions. Therefore, the fact that TEACH employees may have received letters in the Spring of 2003 that they were “at-risk” is immaterial to the Appellant’s status. 2/

2/ *In addition, an “at-risk” letter is not the notice of layoff specified in Sec. ER-MRS 22.07, WIS. ADM. CODE, and Appellant also does not contend that the TEACH employees were actually laid off.*

INVOLUNTARY TRANSFER

Appellant also alleges that the personnel transaction that took place pursuant to 2003 Wisconsin Act 33 was an involuntary transfer. There can be no doubt that Mr. Sutheimer’s move was involuntary in that he did not control either the destination of his position or the particular duties he was assigned at DOA. However, the definition of “transfer” that is found in Sec. ER-MRS 1.02(33), WIS. ADM. CODE, requires movement of an employee into a “different position”:

(33) “Transfer” means 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 class to which any of the employee’s current positions is assigned.

Thus, resolution of the issue in the present case turns on whether the Appellant changed positions, not just employing agencies.

The undisputed facts in this matter compel the conclusion that the Appellant's position was moved or transferred, but the Appellant himself remained in the same position, i.e. position number 325843, both immediately before and immediately after the transaction in question. The Appellant's position was subject to 2003 Wis. Act 33, which abolished both DEG and the TEACH Board. DOA assumed the responsibilities of both agencies. Non-statutory provisions of the Act specified the consequences for DEG employees. Pursuant to Sec. 9115(1)(b)1., 2003 Wis. Act 33:

On the effective date of this subdivision, all full-time equivalent positions in the department of electronic government, except the positions occupied by the secretary, the deputy secretary, the executive assistant, and 2 division administrator positions determined by the secretary of administration, are transferred to the department of administration. (Emphasis added.)

Thus the Act refers to the "transfer" of DEG positions and, in Sec. 9115(1)(b)2., to the movement of the incumbent employees along with their positions into DOA:

All incumbent employees holding positions that are transferred under subdivision 1. are transferred on the effective date of this subdivision to the department of administration.

The Act "moved" the position filled by the Appellant from DEG to DOA and moved the Appellant with the position. Since Appellant did not change positions at that time, he was not subjected to a "transfer" as that term is used in Sec. ER-MRS 1.02(33), WIS. ADM. CODE.

CONSTRUCTIVE DEMOTION

Mr. Sutheimer also contends that he experienced a constructive demotion, a concept not defined by statute but developed in rulings issued by the former Personnel Commission (PC). The PC discussed the concept of constructive discipline in *MIRANDILLA V. DVA*, 82-198-PC, 7/21/83, and extended it to the concept of constructive demotion in *COHEN V. DHSS*, 84-0072-PC, ETC., 2/5/87. In the latter case, after reviewing whether it had jurisdiction to hear a claim of constructive demotion, the Commission held that "[o]nly in the case where the appointing authority takes action which leads to a downward classification transaction, with the intent to discipline the employee, is there a constructive demotion." *COHEN* at 8.

A demotion does not occur unless the employee is assigned a new set of duties better described at a lower level than the previous set of duties. While official reclassification is not

a prerequisite to the existence of a constructive demotion, the Appellant must show that the employer intended to cause a reduction in the classification level of the employee's position, effectively disciplining the employee. *DAVIS v. ECB*, 91-0214-PC, 6/21/94.

The Commission finds the record insufficient to determine the proper classification level of the Appellant's position after August 24, 2003. Part of the difficulty facing the Commission is that no alternative classification to ITMC has been identified. Another is that the Commission lacks the benefit of analyzing the ITMC classification and any alternative classification in the context of one or more comparable positions. The parties' submissions are such that it is not clear whether there is agreement or disagreement in terms of the Appellant's specific responsibilities immediately prior to the transaction in question. There also appears to be a more specific dispute between the parties in terms of the Appellant's responsibilities for functions related to the Uniform Computer Information Transactions Act (UCITA) and/or the Uniform Electronic Transactions Act (UETA). Finally, while Respondent agrees the Appellant's responsibilities were appreciably revised, there is no agreement as to the extent and the significance of those changes.

One of Respondent's arguments merits a more detailed response. Respondent contends that Ms. Thyse's conclusion that the duties assigned to the Appellant after August 24, 2003, were properly classified at the ITMC level precludes any claim of constructive demotion. This contention is premised on the following language from *COHEN v. DHSS*, 85-0072-PC, 2/5/87, p. 7:

In order to avoid possible confusion, it should be emphasized that a constructive demotion requires more than merely a movement of the affected employee to a position that is ultimately determined to have a lower classification than the employee's original position. . . . Certainly not every employee who is transferred into a position which ultimately may be downwardly reclassified has been subjected to a constructive demotion. (Emphasis added.)

Respondent notes that Ms. Thyse, a personnel specialist for Respondent, reviewed Appellant's duties as reflected in the position description referenced in Finding 12 and approved classification of those duties at the ITMC level. The Commission cannot accept this argument, as it would render hollow the concept of constructive demotion if the employing agency had the authority to make the "ultimate" determination of the classification level of the newly assigned duties, without the potential for review by the Commission.

In an effort to guide the parties as to the nature of the remaining dispute, the Commission also addresses the consequences of the draft position description referenced in Finding 10. Respondent has not disputed Appellant's claim that the description of duties in this position description was taken from a position classified at the IS Technical Services –

Senior level, which is a lower classification than ITMC. However, there is no indication DOA actually assigned Appellant the duties set forth in the initial draft position description. The Commission will base its conclusion as to constructive demotion on the proper classification level for the duties actually assigned to the Appellant upon the move to DOA, rather than on the duties that DOA merely contemplated assigning to the Appellant.

Finally, the Commission notes that Appellant's claim of constructive demotion relates to a Career Executive position and that "demotion" in the Career Executive context may have a different meaning than for positions outside of that program. See ER-MRS 30.10(3), WIS. ADM. CODE.

Therefore, based on the materials before us, we lack sufficient information to determine whether Appellant's position continues to be correctly classified as an Information Technology Management Consultant. Accordingly, we deny the motion for summary judgment as to the question of constructive demotion.

The parties will be contacted to schedule a pre-hearing conference. If necessary, a hearing will be held in which the Appellant will have the burden of establishing all elements of his constructive demotion claim, including the intent to discipline.

Dated at Madison, Wisconsin, this 22nd day of June, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

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