STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

KATHY WARREN, Appellant,

vs.

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

Case 6
No. 63110
PA(adv)-28

Decision No. 31215-A

Appearances:

Kathy Warren, 3510 Ridgeway Avenue, Madison, Wisconsin 53704, appearing on her own behalf.

Paul Harris, Attorney, P.O. Box 7850, Madison, Wisconsin 53707-7850, appearing on behalf of the Department of Health and Family Services.

David Vergeront, Chief Legal Counsel, Office of State Employment Relations, P.O. Box 7855, Madison, Wisconsin 53707-7855, appearing on behalf of the Division of Merit Recruitment and Selection.

FINAL DECISION AND ORDER

Kathy Warren filed an appeal with the Wisconsin Personnel Commission (PC) from a temporary assignment of duties in June 2000 and from a later transaction permanently moving her from a Program Assistant Supervisor 2 position to a Program Assistant 4 position effective November 2000. In a ruling dated November 12, 2001, the Personnel Commission addressed jurisdictional objections raised by Respondent Department of Health and Family Services (DHFS) and dismissed that portion of the case relating to the temporary assignment of duties but denied the motion to dismiss the portion of the appeal arising from the permanent assignment to the Program Assistant 4 position. The PC's ruling is discussed at some length elsewhere in this decision. Ms. Warren contends the remaining, permanent transaction was a constructive demotion while Respondents contend it was a transfer.

Personnel Commissioner Kelli S. Thompson was designated as the Hearing Examiner and presided over a contested case hearing on June 24 and 25, 2002. The hearing was held on the following issues:

1. Whether appellant was qualified to perform the work of the PA 4 position after customary orientation for a newly hired worker in the position.

2. Whether respondent DHFS' decision to permanently remove the appellant from her supervisory position and place her in a non-supervisory position constitutes a constructive demotion within the meaning of Sec. 230.44(1)(c), Stats., and if so, whether just cause existed for the action.

A briefing schedule was established and the record closed on December 26, 2002, after receipt of Appellant's reply brief. Commissioner Thompson resigned from the Personnel Commission in January 2003 and the PC was abolished pursuant to 2003 Wis. Act 33, effective July 26, 2003. The authority for processing this matter was transferred to the Wisconsin Employment Relations Commission (Commission) at that time. Commissioner Susan J.M. Bauman was designated as the Hearing Examiner on January 20, 2005. She has listened to the entire tape recording of the hearing, reviewed the exhibits introduced at hearing and considered the parties' written arguments. By letter dated February 2, 2005, Commissioner Bauman asked the parties to state their respective positions with respect to whether it would be appropriate for the Commission to take official notice of certain information. The parties filed arguments and responses, the last of which was received on March 14, 2005, at which time the record was closed, again.

The hearing examiner issued a proposed decision on May 9, 2005. Appellant requested oral argument which was held on December 7, 2005. In the interim, counsel for Appellant withdrew from the case.

For the reasons set forth below, the Commission finds that Appellant was qualified to perform the work of the PA 4 position after customary orientation for a newly hired worker in the position and that under the facts of this case, Appellant has failed to show that the permanent assignment was a constructive demotion so as to grant the Commission subject matter jurisdiction over that claim. Revisions to the proposed decision are noted by alphabetical footnotes.

The Commission now makes and issues the following

FINDINGS OF FACT

At the commencement of the hearing in this matter, the parties reached a partial stipulation of facts based on the findings that had been made by the PC in its Decision and Order issued on February 9, 2001, in WARREN V. DHFS, 98-0146-PC, 98-0164-PC-ER, as well as the Ruling on Motion to Dismiss that was issued by the PC in the present case on November 12, 2001. The Findings set out below constitute a summary of the facts necessary to decide the issues before us.

1. In April 1987, Ms. Warren commenced employment with what is now known as the Disability Determination Bureau (DDB), Division of Health Care Financing, Department of Health and Family Services as a Program Assistant 1 (PA 1). The DDB processes Social Security disability claims. In November 1988, she was promoted to a Program Assistant 2 Supervisor (PA 2 Sup) position in Support Unit 3. The Employer alleged Ms. Warren had performance problems, including creating conflicts with other supervisors, while employed in the latter position. As a result, some time prior to April 1991, she was assigned to a PA 2 Sup position in another unit. For the period April 1991 through March 1992, Appellant's evaluation indicated that she had not consistently met performance expectations.

2. In August 1992, Appellant was demoted from her supervisory position to a Program Assistant position. In December 1992, Appellant challenged her demotion before the PC. A settlement was reached in May 1996, resulting in Ms. Warren's reinstatement to a Program Assistant 2 Supervisor position in Support Unit 3 in the DDB, effective June 10, 1996. This Unit, before, during, and after Ms. Warren's employment there, was marked, to a greater extent than the other support units, by rumors, gossip, unprofessional conduct, time reporting abuses, and productivity problems on the part of the Program Assistants and other clerical staff. During the relevant time period, this unit also had a significantly higher turnover rate in its Program Assistant and other clerical positions than the other support units. These problems were more prevalent and less effectively managed during Appellant's tenure as supervisor of the unit. Ms. Warren was the target of some of the rumors and gossip.

3. Soon after her reinstatement, Ms. Warren was told by Mr. Shelton, Director of the DDB, that Support Unit 3 had traditionally been a difficult unit to supervise, and that other non-supervisory positions were available in the Bureau. Mr. Shelton did not believe at that time or thereafter that Ms. Warren was capable of being a successful supervisor. During her tenure in the Bureau, Appellant was observed on several occasions yelling at co-workers, demonstrating anger toward them, and invading their personal space by approaching them too closely; sharing with co-workers accounts of her activities outside of work in which she attempted to intimidate and even damage the property of those with whom she had disagreements; and was demanding and uncompromising in regard to certain workplace issues. During her tenure as a supervisor in the DDB, Ms. Warren was perceived by her subordinates to be intimidating due to the manner in which she interacted with them, not due to the performance expectations she set for them.

4. James Twist was Ms. Warren's supervisor during her tenure as a supervisor in Support Unit 3 (SU 3). Upon her reinstatement, Mr. Twist provided Ms. Warren with a Performance Planning and Development (PPD) planning document setting forth the major job objectives and expectations of her SU 3 PA 2 Sup position. Appellant's position description signed on March 3, 1997 by Appellant included the following Summary:

This position functions as part of the Bureau Management team and supervises a support unit which performs complex technical tasks and support functions for the processing of disability claims under Title II, XVI, and XIX. This support is provided for Disability Specialists and Medical Consultants. The units' primary responsibilities include producing documents to request medical and work records for disability evidence, from claimants, medical providers, lay persons, other Social Security Offices and if necessary, follow-up letters on previous requests. Responsibilities include the preparation of final disability determinations, individualized claim notification letters and performance of various computer support functions such as file maintenance to update claimant address and/or phone number. Most documents require extensive medical and technical vocational terminology.

Other primary support duties include performing functions related to the control of all claim files, association and disposition of all correspondence related to claim files, noting appropriate case actions necessary by other units in this Bureau and routing and delivering claim files. Supervisory actions taken to revise unit procedures, policies and performance are acted upon independently under general supervision. The requirements of this position include extensive knowledge of the WANG computer system related to the unit's extensive functions, their maintenance, including updating and revising system documents, and the maintenance and/or updating of their software. Assistance to the management team is provided through recommendations and feedback as well as in the performance of administrative duties which promote the Agency's goals.

5. During 1997, Division and DDB management held a series of meetings with SU 3 staff to discuss concerns that had been brought to management's attention by numerous SU 3 and DDB staff members. One of the goals of these meetings was to develop an action plan for the Unit, an element of which was to make Ms. Warren a better supervisor. In May 1997, Mr. Twist completed a draft of an action plan for SU 3. He indicated in the introductory paragraph that he had developed the plan with input from Ms. Warren and others. This plan addressed team building, conflict resolution, training, and performance expectations for all SU 3 staff. As a result of this action plan, SU 3 staff was required to attend training sessions relating to managing change, handling conflict, fair employment law, the impact of gossip on a work environment, and other related topics.

6. Upon her return to the SU 3 in June 1996, Appellant performed under the close supervision of Mr. Twist. After March 1997, she performed her duties more independently. In June 1997, Mr. Twist prepared a results PPD that indicated Ms. Warren's performance for the prior evaluation period, June 1996 through March 31, 1997, was satisfactory in regard to

each major job objective. On June 5, 1997, Ms. Warren and Mr. Twist signed a planning PPD for the April 1, 1997 through March 31, 1998 evaluation period. The major job objectives and expected results in this planning PPD were identical to those in Appellant's PPD for the 1996-97 evaluation period. During his supervision of Ms. Warren, Mr. Twist consistently discussed with her the concerns brought to his attention or to the attention of other Bureau managers by her subordinates.

7. Frances Lyons was initially employed in the SU 3 in 1997 and returned to the Unit in 1998. After Ms. Lyons' return to the SU 3, she formed the impression that Ms. Warren was spending too much time seeking her out and spending time with her. Ms. Lyons suspected that Appellant had a sexual interest in her and asked Ms. Warren's supervisors in March 1998 to direct Appellant to limit her interactions with Ms. Lyons to those contacts necessary to carry out work responsibilities in SU 3. Mr. Twist met with Ms. Warren at least three times in response to Ms. Lyons' complaints. Mr. Twist directed Ms. Warren to reduce her contacts with Ms. Lyons to those necessary for conducting SU 3 business and to go into Ms. Lyons' workspace only when necessary.

8. On April 3, 1998, Ms. Lyons complained to one of Ms. Warren's supervisors that Appellant had called her "pussycat." Ms. Warren was asked about it, and she admitted that she had made the statement.

9. On May 13, 1998, Mr. Twist met with Ms. Warren to discuss her annual performance evaluation. Mr. Twist advised Ms. Warren that her performance for the current evaluation period had been unsatisfactory overall and explained the specific bases for his evaluation. On June 25, 1998, Mr. Twist completed a results PPD for Ms. Warren, based on the planning PPD presented to her in November of 1997, incorporating the substance of what he had discussed with her on May 13. He indicated Appellant's performance was unsatisfactory or needed improvement in numerous areas.

10. During the morning of May 14, 1998, Ms. Warren noticed that Ms. Lyons had not completed her mail duties. Appellant located Ms. Lyons in the work unit and told her that she wanted to speak with her in the conference room. On May 18, 1998, Ms. Lyons prepared a written account of what occurred at this meeting. In part, this account states as follows:

> Then she said that she wanted to go off the record, I said no! She said I understand if you are afraid you might say something that doesn't sound right, because I'm afraid to say anything to you or look at you because you might think the wrong thing. Then she says I just want to know what's going on? So I wouldn't say anything, and I could tell she was getting upset then she start saying how we use to could talk about anything until someone start spreading rumors and making things out to you like there was more behind them and there

> isn't! And when I find out who is spreading the rumors they won't be talking for a while because they will have not one but two fat lips! Because I know people who know how to make other people stop talking! And I will find out because I have ask Jim to do a full investigation! Then she said you know I told my son about it last night and he was ready to kill somebody.
>
> The she said, anyway I think you are a good worker and that's why I worked so hard to get you that project and my goal was to make you a permanent position. And I was just sitting there nodding my head the whole time scare to death (literally) after she said that! Then she said how she wanted me to stay here in the unit. And ask if I planned on leaving? I said no. Then she said OK and was getting ready to leave and she said can I ask you one more thing? I said yes, she said are you going to tell Jim that we talked I said well I have a meeting with him today and he will probably ask me if I had any problems or if I had talked to you and I will tell him yes. She got this look on her face and said he will ask you about that? I said probably, she said OK and we left.

11. Ms. Lyons reported this incident immediately after it occurred. Ms. Bakke, Deputy DDB Director, interviewed Ms. Lyons about the incident and sent her home for the rest of the day. Ms. Bakke then asked Ms. Warren to come to her office. She advised Appellant that a serious allegation had been made about certain of her conduct, that an investigation would be conducted, and that she would be placed on paid administrative leave until this investigation was completed.

12. Before May 14, 1998, Mr. Shelton became aware that one of Ms. Warren's co-workers had reported that Ms. Warren had made a statement in the work unit about "getting a gun." Mr. Shelton reported this allegation, as well as the allegation raised by Ms. Lyons, to the Capitol Police. The Capitol Police investigated these allegations, did not find evidence of criminal conduct, and concluded that the incidents should be treated as employment matters.

13. Mr. Shelton then consulted Division management who recommended to him that the investigation of these employment matters involving Ms. Warren should be conducted by an experienced investigator outside the Bureau. James Yeadon, an attorney and a supervisor in DHFS's Client Rights Office, was assigned to conduct the investigation. Yeadon did a lengthy and thorough investigation and issued his report on July 2, 1998. In this report, Mr. Yeadon described the scope of the investigation as follows:

> During our interviews with employees, it became clear that the vast majority of them did not appreciate Ms. Warren's supervisory style and many are

personally afraid of her. There were allegations made of intimidation by her of the people she supervises. These allegations included her doing the following:

- giving employees inconsistent instructions;
- "yelling" in a "red faced" manner at some employees;
- "belittling" some employees in front of others;
- violating people's "personal space" during discussions;
- making employees cry on several occasions;
- showing favoritism toward people she liked; and
- retaliating in terms of added workload or work product sabotage for people who challenged her authority.

Since her supervisor, Jim Twist, is keenly aware of these personnel issues and is dealing with them through the PPD process, we left the handling of these issues to him. Instead, we focused our investigation on the facts surrounding three particular matters. These are:

- An allegation that Ms. Warren had shown some documents from someone else's personnel file to Ms. Lyons;
- An allegation that Ms. Warren said something about bringing a gun to work; and
- An incident that took place on May 14, 1998, between Ms. Warren and Frances Lyons, during which Ms. Lyons says she was threatened with violence.

In his report, Yeadon concluded there was insufficient information to support either of the first two allegations. In regard to the personnel file issue, Yeadon found there were insufficient facts from which to conclude that the document in question came from an actual personnel file and not from some other file, so no violation of respondent's work rules was found. Yeadon found, in regard to the gun issue, that there was not enough evidence from which to conclude that Ms. Warren's comment about the gun was in reference to using it on others and, therefore, this incident did not meet the definition of a "threat" within the meaning of respondent's zero-tolerance policy on threats or violence in the workplace. However, Mr. Yeadon concluded in regard to the incident involving Ms. Lyons that Ms. Warren violated the Department's "zero tolerance" policy for violence and threats in the workplace. He recommended that Ms. Warren be given appropriate discipline for violating this policy.

14. In an addendum to his report, Mr. Yeadon made several observations about the work atmosphere in SU 3. He wrote:

> . . . To return Ms. Warren to work as a Supervisor of SU-3 is a recipe for disaster. To return Ms. Warren with modest disciplinary action ... will, in our opinion, bring emotional and social chaos to SU-3. ...

> A functional collapse of morale and a great anger at the administration are likely to occur. Employee turnover is likely to increase dramatically as people flee from a fearful and intimidating workplace that is strife with negative emotionality. Several people have already stated in writing their intention to quit if Ms. Warren comes back as a supervisor. …
>
> Given the information gathered by our investigation, it may be appropriate for the state to take a firm stance prohibiting Ms. Warren from returning to the DDB, especially in a supervisory position. …

15. In a letter to Ms. Warren dated July 23, 1998, Mr. Shelton summarized the process that had been followed to date in investigating the allegations against her, and advised her that management was continuing to discuss how best to implement her orderly and fair return to the office. In this letter, Mr. Shelton informed Ms. Warren that the recent allegations about her conduct had added to the existing anxieties certain staff members had about her, suggested that one way to alleviate some of this anxiety may be to distribute to staff certain portions of Mr. Yeadon's report, sought Ms. Warren's input about distributing this information to staff, and gave her a deadline of August 5, 1998, to provide this input. Finally, Mr. Shelton suggested that her return may best be facilitated by placing her in a non-supervisory position for a period up to six months, and described for her the duties and responsibilities of this proposed temporary position.

16. Also on July 23, 1998, Ms. Warren was provided and given the opportunity to respond to a draft disciplinary letter imposing a reprimand for violating DHFS's "Zero-Tolerance: Violence and Threats in the Workplace" policy. The reprimand would be treated as a three-day suspension without pay for purposes of future discipline. Appellant responded to this letter. Her response was provided to Mr. Yeadon who concluded that nothing in this response would alter the conclusions in his report. By letter dated August 7, 1998, John Chapin, Administrator of the Division of Health, issued Warren a written reprimand in lieu of a three-day suspension, a format designed to maintain Warren's exempt status under the Fair Labor Standards Act.[1]

17. After August 7, 1998, respondent provided Ms. Warren with various options for her return to work, and engaged in extensive discussions with her about these options. Appellant rejected all options offered as alternatives to her return to her previous supervisory position in SU 3.

18. While Ms. Warren was on administrative leave, several employees of SU 3 indicated that they would resign or request transfer rather than work with Appellant because they feared for their safety. At some point prior to June 23, 2000, DHFS convened a meeting

[1] Ms. Warren appealed the action to the PC which found just cause for the August 7th discipline. WARREN V. DHFS, 98-0146-PC, 98-0164-PC-ER, 2/9/01.

of SU 3 and other Bureau staff to announce Ms. Warren's return. Mr. Shelton and Ms. Bakke had retired and new administrators had been hired to take their places.

19. On June 23, 2000, Judy Fryback, the new DDB Director, mailed Ms. Warren a letter and a memo directing her to return to work effective June 28, 2000. Appellant was temporarily assigned to perform the duties of Case Information Manager for DDB, a non-supervisory position. Her classification was not changed during this temporary placement. During this period, Appellant was supervised by Mr. Twist.

20. Ms. Warren was informed on October 18, 2000 (orally) and on October 20, 2000 (in writing), that she was removed permanently from her supervisory position and placed in a non-supervisory position effective November 5, 2000.

21. The November 5th transaction occurred while a written agreement was in effect that delegated the authority of the Administrator of the Division of Merit Recruitment and Selection to DHFS for authorizing transfers in that agency.

22. The new non-supervisory position was assigned to the Program Assistant 4 classification and had a working title of Disability Development Specialist (hereafter Development Specialist). Michael Gourlie, DDB Section Chief in charge of the Disability Review Section, served as supervisor.

23. As of November 5, 2000, the PA 4 classification was assigned to pay range 2-11, with a pay maximum of $16.053 per hour, and the PA Sup 2 classification was assigned to pay range 1-11, with a pay range maximum of $19.001 per hour. The Department of Employment Relations designated pay ranges 2-11 and 1-11 as counterpart pay ranges. The State of Wisconsin classification system assigns numerous non-supervisory classifications to pay ranges that are higher than those assigned to various supervisory classifications.

24. In November 2000, DHFS did not employ any other persons with a working title of Development Specialist. However, the agency had previously employed at least three people with the same working title.

25. During the relevant period of time, Wisconsin had the second highest backlog of Social Security disability cases in the nation.

26. DHFS elected to both temporarily reassign Ms. Warren and then permanently move her to the PA 4 position because management was concerned about what would occur if Ms. Warren returned to a supervisory position, because there was a need for additional assistance preparing disability claims for review, and because management believed that upon receiving customary orientation in her new position she would have the skills necessary to perform the duties of a Development Specialist.

27. Supervisor Gourlie developed a position description for the PA 4 position. Gourlie and Ms. Warren signed the position description on November 7, 2000. One section enumerates the following "Knowledges and Skills" as necessary for the new position:

1. Ability to communicate effectively, not only with the general public and co-workers, but also with various professionals including attorneys, physicians, congressional representatives, health care professionals, and other governmental agencies. Mode of communication includes written correspondence, telephone calls, and face-to-face discussions.
2. Thorough knowledge of diagnostic tests and procedures necessary to document impairments and their severity.
3. Thorough knowledge of medical terminology, including advances in medical technology, disease processes, and the resultant functional limitations, as they pertain to disability documentation.
4. Knowledge of acceptable telephone professionalism including knowledge of information gathering and interviewing techniques.
5. Knowledge of Wang/Personal Computer procedures and equipment.
6. Ability to create and alter computer records.
7. Ability to understand and independently carry out complex written and oral instructions from the section chief, unit supervisors, Disability Specialists and Disability Claims Reviewers.
8. Ability to understand, apply, and adapt to numerous and frequent SSA program changes regarding policies and procedures.
9. Knowledge and comprehension of agency and development techniques and the Disability Program processes as it affects all types of disability claims.
10. Knowledge of goals so that work performed meets bureau and SSA expectations.
11. Thorough knowledge of the regulations governing the release of medical and government file information.
12. Knowledge of contents and organization of disability claim files.

28. At the time Ms. Warren began working in the PA 4 position, DHFS considered her to have greater responsibilities than those that had been assigned to the Development Specialists who had previously worked at DHFS. Dubbed a Development Specialist "Plus," Warren initially performed independent analysis of medical, vocational and collateral evidence and determined the need for any additional and necessary development and/or scheduled consultative examinations. She undertook the necessary development, requested the examinations and assured appropriate follow-up with the claimants. After Warren had been working in the new position for a few months, DHFS determined that the needs of the agency were best met if her responsibilities were limited to the same type of work that had been performed by the previous Development Specialists as her participation in this aspect of the work substantially reduced the numbers of pre-developed cases that could be generated.

29. Mr. Gourlie was not part of the decision-making process that resulted in Appellant's transfer to the PA 4 position. He did, however, write the position description and develop Appellant's orientation to the job which included a training program.[A] Mr. Gourlie was aware of the training provided to the previous Development Specialists, but was unaware of the duration of that training. The training program Mr. Gourlie designed was to take at least three months, and included classes on medical topics that had already commenced for a class of new Disability Determination Specialists, as well as mentoring of Appellant by various personnel within the office.

30. Appellant received the customary orientation provided to new employees hired into Development Specialist positions. The orientation included training that was tailored to the needs of the DDB.[B]

31. Mr. Gourlie did not expect Appellant to feel comfortable in the position, or work independently, for at least three months. After Ms. Warren had been working six months in the position, Gourlie concluded that she was performing satisfactory work.

32. On November 27, 2000, Appellant signed a Performance Planning and Development Report (PPD) for the period November 5, 2000 through September 29, 2001 and added the comment: "My signature indicates receipt of this PPD, but does not indicate agreement or understanding of proposed duties." The "Major Objectives or Key Responsibilities" (identified in italics, below) and the corresponding "Performance Expectations or Standards" were:

> *A. Develop medical, vocational and collateral evidence on assigned disability claims in an efficient and appropriate manner resulting in timely assignment to disability examiners for determination and disposition.*
>
> A1. Complete a critical review and analysis of intake with full consideration of jurisdictional issues. Review any previous decisions and assess documentation and decisional issues that require resolution. Take necessary actions and/or develop evidence promptly.
>
> A2. Develop and maintain an effective caseload management plan. This plan should include taking prompt, appropriate and efficient follow-up actions on cases where all requested information has *not* been received. The plan should also assure the timely reassignment of cases to disability examiners where all evidence is in or where sufficient follow-up actions have not yielded receipt of requested evidence. Follow-up actions and reassignment should take place within 2 working days of the action becoming necessary.

[A] The Commission has modified this sentence to more accurately reflect its interpretation of the term "orientation."

[B] The Commission has modified this sentence to more accurately reflect its interpretation of the term "orientation."

A3. Specifically identified cases must be prioritized in case handling. These types of cases include, but are not limited to, TERI case, Congressional inquiries, and aged cases. Be able to identify priority cases and follow all specified action required per prescribed procedure.

A5. [sic] Promptly identify and appropriately refer for reassignment potential presumptive disability determinations on initial SSI cases.

B. Evaluate file information to determine remaining development activity and case disposition.

B1. Independently analyze medical, vocational and collateral evidence and determine the need for any additional and necessary development and/or the scheduling of a consultative examination. Undertake necessary medical vocational or other development. Appropriately request consultative examinations following prescribed procedure and assure appropriate follow-up with the claimant is executed to assure maximum compliance. Assure prompt follow-up with CE vendor for timely receipt of complete report.

B2. Appropriately determine the existence of sufficient vocational information to cover the relevant time periods necessary for adjudication.

B3. Appropriately document failure to cooperate/whereabouts unknown issues and 301 work incentive provisions.

C. Communicate and work effectively with claimants, the medical, legal and government communities, supervisors and other agency personnel with whom the development specialist is in contact during the course of the workday.

C1. Respond to telephone and written requests from claimants, SSA personnel, members of Congress and agency personnel in a timely manner. Respond to Congressional Inquiries, Privacy Act and Freedom of Information Requests per the prescribed regulations and within designated timeframes.

C2. Communicate effectively with appropriate language and analysis in written correspondence such as technical rationales and Personalized Denial Notices, and file documentation such as Reports of Contact, worksheets, and SSA forms (RFC, PRTF, MRFC, 538, etc.).

C3. Provide primary phone backup for cases in DRS staging. Handle inquiries from claimants, representatives, field office and treating sources promptly. Refer urgent handling situations to supervisors for appropriate disposition.

C4. Develop and maintain an effective working relationship with staff, coworkers, general public, other government agencies (includes Federal, State, City, County, etc.) and any other discipline you have contact with in your position.

C5. Sustain an effective working relationship with the supervisor. Seek advice as appropriate, research and prepare issues properly for discussion, and effectively work with supervisory directions and advice.

D. Organizational support and professional development activities.
D1. Contribute to organizational and unit support activities.
D2. Participate in training and other professional development activities, as directed.
D3. Provide feedback to agency management concerning disability development activities.
D4. Maintain an up-to-date understanding of the capacities and characteristics of the agency computer systems.

The PPD also noted that in order for Ms. Warren to meet performance expectations, she would attend "selected [Disability Determination Specialist-Entry] training modules" during the period covered by the report.

33. Over the first several months of her employment in the position, Ms. Warren e-mailed and commented to Mr. Gourlie about her on-going concerns about her ability to perform her duties. For many months, she relied heavily on the assistance of other staff in order to complete her assigned tasks. Despite Appellant's concerns, Gourlie was satisfied with the progress she was making.

34. On March 8, 2002, Mr. Gourlie completed the "Results" section of the PPD described in Finding of Fact 32. Appellant signed it on March 12, 2002. Mr. Gourlie indicated that the Appellant's results were Satisfactory with respect to performance expectations A1., A2., A3., A5., B2, B3., C1., C2., C4., C5., D2., D3., D4 and with respect to the training activities He provided the following additional comments with regard to the other expectations:

B1.: "Satisfactory. We did this for a portion of the evaluation year. However, it was deemed that this assessment reduced substantially the numbers of pre-developed cases that could be generated and we scaled back considerably in the amount of [sic]"
C3.: "Satisfactory. However, the primary phone backup for staged cases in DRS has been shifted to another employee."
D1.: "Satisfactory. You volunteered to be trained in intake activities in CFM and have assisted that unit with that activity both as part of your regular duties and as part of overtime. In addition, you've been a very productive participant in the Closure Assembly parties."

Gourlie also wrote the following summary of Ms. Warren's performance:

Overall it has been a very productive year for you. You assimilated into the role of a development specialist quite nicely and have done a credible job with

> your predevelopment. There have been some development issues identified on your claims over time. Primarily, this has involved not developing claims back to an optimal date (at least since AOD on Title 2 and at least a year prior to application on Title 16). This general rule applies even if claimants state they have not had treatment from a particular source that far back. Often times, the claimant is incorrect about how far back treatment goes. In addition, depending on allegations, impairment type, and history, developing claims to a even earlier point is advisable. This assures onset severity and impairment evolution is adequately documented. You've responded nicely to feedback on these types of situations when they have been identified to you. There have also been periodic situations where medical sources were overlooked and therefore not developed. Again, you've been responding positively when this type of constructive criticism has been shared with you.

35. Appellant did not feel fully comfortable in her new position until June 2002.

36. There is a long history of encouraging clericals to seek and move into Examiner positions. Gourlie's opinion of Ms. Warren's work skills and ethics compared favorably to others who came from the clerical ranks to positions of Examiner or, in Appellant's case, Development Specialist.

37. If Ms. Warren chose to vacate her PA 4 position and another person were to be hired, the orientation provided to the new employee would be the same as that provided to Ms. Warren. The same approach and time for training would be provided although there would be less medical training as the medical assessment portion of the job has been removed.[C]

38. No incidents involving Ms. Warren's interactions with other employees have been reported to Respondent since her return to work on June 28, 2000.

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to Sec. 230.44(1)(a), Stats.

2. Appellant has the burden to show that she was not qualified to perform the work of the PA 4 position after customary orientation for a newly hired worker in the position.

3. Appellant has failed to sustain her burden.

[C] The Commission has modified this sentence to more accurately reflect its interpretation of the term "orientation."

4. Given the facts of this case, the Wisconsin Employment Relations Commission lacks jurisdiction under Sec. 230.44(1)(c), Stats., with regard to the Appellant's claim of constructive demotion.

ORDER

This appeal is dismissed in all respects.

Given under our hands and seal at the City of Madison, Wisconsin, this 22nd day of December, 2005.

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

DHFS & DMRS (Warren)

MEMORANDUM ACCOMPANYING DECISION AND ORDER

FACTUAL SUMMARY

Since April 1987, Kathy Warren has been employed by the State of Wisconsin in the Disability Determination Bureau (DDB), Division of Health Care Financing, Department of Health and Family Services, or its predecessor units. She was initially hired as a Program Assistant 1 and promoted to a Program Assistant 2 - Supervisor (PA 2 Sup) in November 1988. Although her tenure in this position was not continuous, as of May 1998, she was the supervisor of Support Unit 3 (SU-3). Her supervisor was James Twist.

On May 14, 1998, Ms. Warren had a meeting with one of her subordinates, Frances Lyons. Immediately subsequent to this, Ms. Lyons reported the substance of the meeting to the Deputy Disability Determination Bureau Director, Louise Bakke. Ms. Bakke then placed Ms. Warren on paid administrative leave to allow for an investigation of Ms. Lyons' concerns as well as a number of rumors and additional allegations of improper behavior by Ms. Warren.

James Yeadon, an attorney and supervisor in Respondent's Client Rights Office, was assigned to conduct an investigation. He concluded that Ms. Warren had violated the Department's policy on "zero tolerance" for violence and threats in the workplace and recommended that appropriate discipline be administered. In a supplement to his report, Mr. Yeadon advised that to "return Ms. Warren to work as a Supervisor of SU-3 is a recipe for disaster."

On August 7, 1998, Ms. Warren was issued a disciplinary letter imposing a reprimand which was to be treated as a three-day suspension without pay for purposes of future discipline. Ms. Warren continued to be on paid administrative leave thereafter. In fact, she did not return to work at the DDB until June 28, 2000, more than two years after being placed on leave.

Ms. Warren reported to work on June 28, 2000 and was temporarily assigned to the duties of a Case Information Manager for DDB. She reported directly to Mr. Twist. Ms. Warren continued to occupy a position classified as PA 2 Sup.

On October 18, 2000, Ms. Warren was orally informed that she was being permanently removed from her supervisory position and being placed in a non-supervisory position as a PA 4, Disability Development Specialist, effective November 5, 2000. The new classification is in a counterpart pay range to Ms. Warren's former classification of PA 2 Sup.

Michael L. Gourlie, DDB Section Chief in charge of the Disability Review Section, is Ms. Warren's supervisor. He wrote Ms. Warren's position description and coordinated the orientation and training of Ms. Warren in her new position. He rated her performance as satisfactory in March 2002. [2]

PROCEDURAL SUMMARY

Upon temporary assignment of Case Information Manager duties to her in June 2000, Appellant filed an appeal with the State of Wisconsin Personnel Commission (PC). After being advised that she was being permanently reassigned to a PA 4 position, Ms. Warren amended her appeal to include the latter transaction. Respondent subsequently filed a motion to dismiss for lack of subject matter jurisdiction.

The PC unanimously concluded that it lacked jurisdiction to decide whether the action of DHFS to temporarily transfer Appellant from her supervisory position to a non-supervisory position was contrary to the civil service code. However, a divided PC found that it had the authority to review the permanent reassignment as to the following issues:

1. Whether the decision by respondents DHFS and DMRS to permanently transfer the appellant from her supervisory position to a non-supervisory position was contrary to the civil service code (subch. II, ch. 230, Stats., and the administrative rules issued hereunder).

2. Whether respondent DHFS' decision to permanently remove the appellant from her supervisory position and place her in a non-supervisory position constituted a constructive demotion, within the meaning of Sec. 230.44(1)(c), Stats., and if so, whether just cause existed for the action.

The parties subsequently refined the first issue to read as follows:

> Whether appellant was qualified to perform the work of the PA 4 position after customary orientation for a newly hired worker in the position.

In essence, the Respondents contend the permanent reassignment was a transfer while the Appellant contends she was constructively demoted.

[2] In her Initial Brief, Appellant indicates, in footnote 2, page 12, that the stipulated facts regarding her wage adjustments are incorrect. Respondent DHFS contests this statement in a footnote on page 10 of its initial brief. In light of our finding that the involuntary transfer of Appellant to the PA 4 position did not violate the civil service statutes or rules, it is unnecessary to address any disagreement regarding appellant's wage rates.

Eligibility for transfer: qualified after customary orientation[D]

The Commission's authority to review the issue of the involuntary move of Ms. Warren to the PA 4 position is based on the following language from Sec. 230.44(1), Stats.:

> [T]he 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 [of the Division of Merit Recruitment and Selection] or by an appointing authority under authority delegated by the administrator under s. 230.05(2).

The Administrator of DMRS has the authority, as described in Sec. ER-MRS 15.02, Wis. Adm. Code, to authorize a transfer and may delegate that authority to the employing agency. A delegation agreement existed between DMRS and DHFS during the time period that is relevant to the transaction involving Ms. Warren, so the decision being reviewed here was actually made by DHFS. The parties to this case have agreed that the only legal question relating to the alleged transfer is whether Ms. Warren was eligible for transfer as provided in Sec. ER-MRS 15.01, Wis. Adm. Code:

> To be eligible for transfer, an employee shall be qualified to perform the work of the position to which the employee would transfer after customary orientation provided for a newly hired worker in the position.

Ms. Warren concedes that if she was qualified to perform the work of the PA 4 Development Specialist position after "customary orientation for a newly hired worker in the position," then Respondents have complied with the requirements of the civil service code. Because she has the burden of persuasion, Warren must establish, by a preponderance of the evidence, that she was not qualified to perform the work assigned to her new position after "customary orientation."

Respondent DMRS' witness, Denny Huett, has over 29 years of experience in the civil service field. At the time of the hearing, he was a policy advisor for DMRS and advised state agencies about civil service transfers. Although not involved in the Appellant's transfer, Huett was present at the entire hearing, heard the testimony and reviewed the exhibits offered. Huett's credible testimony concluded that Appellant was qualified to perform the duties of the PA 4 position following customary orientation. Huett came to this conclusion based on the position description of Appellant's PA support position which is similar to other PA positions;

[D] The Commission has substantially modified this section of the proposed decision so that it accurately reflects the Commission's analysis.

the fact that the new position is a counterpart position to the one Appellant previously held; and on Appellant's status as a long term employee in the Bureau. She was not a stranger to the functions of the Bureau, its programs, interrelationships, forms, procedures or processes. Additionally, the testimony of Appellant's current and former supervisors (to the effect that the duties of the PA 4 position meshed well with Appellant's skills and abilities) supports this conclusion. Finally, Huett concluded that Appellant was qualified for the position based on Gourlie's testimony that the training Appellant received was the sort of training that would be provided to a new worker in the position and on Gourlie's satisfactory performance evaluation of Appellant after several months in the position.

Appellant argues that Huett's lack of knowledge of Appellant and her positions at the DBB makes his testimony less than compelling. As a general matter, we credit Huett's testimony as providing very strong evidence of the manner in which Sec. ER-MRS 15.01, Wis. Adm. Code has traditionally been applied. Nevertheless, we find it appropriate to conduct our own analysis of the central question presented, i.e. whether Appellant should be viewed as someone who would be able to perform the work of the PA 4 position after "customary orientation for a newly hired worker in the position."

At the time of the events in this matter, the Administrator had not issued a formal definition of the phrase "customary orientation" as it is used in Sec. ER-MRS 15.01, Wis. Adm. Code. However, in January 2002 Respondent DMRS apparently issued a chapter of the Wisconsin Human Resources Handbook that includes a definition of the term "customary orientation and training." This document was not an exhibit in this case and was not the subject of any testimony. The Commission first learned of the handbook definition *after* the parties had submitted their post-hearing briefs. The chapter containing the definition is entitled "Permanent Layoff of Nonrepresented Employees."

The parties were afforded the opportunity to inform the Commission as to what, if any, effect this definition should have on the Commission's analysis in this case, including the question of whether it would be appropriate for the Commission to take official notice of the definition, as provided in Sec. 227.45(3), Stats. That subsection provides:

> An agency or hearing examiner may take official notice of any generally recognized fact or any established technical or scientific fact; but parties shall be notified either before or during the hearing or by full reference in preliminary reports or otherwise, of the facts so noticed, and they shall be afforded an opportunity to contest the validity of the official notice.

The circumstances in the present case are comparable to those in HARRON V. DHSS, CASE NO. 91-0204-PC (PERS. COMM. 8/26/92), which arose from a disciplinary action. The appellant in that matter contended the employing agency's policy prohibited reliance, for progressive

discipline purposes, on any disciplinary action more than 12 months old. The only competent evidence of the policy was a copy that had been attached to appellant's post-hearing brief and the document had not been exchanged prior to the hearing as required by Sec. PC 4.02, Wis. Adm. Code. The PC refused to take official notice of the policy, holding that it did not appear to constitute an "established technical or scientific fact" or a "generally recognized fact." The official notice issue in the instant matter also arises from a written statement of policy/practice that was not exchanged prior to hearing. In addition, the policy statement relating to the present case did not even exist at the time of the underlying personnel action and the definition is of the phrase "customary orientation and training" rather than of "customary orientation". Finally, the language in question was clearly written to address issues of personnel movement as a result of layoff rather than in the context of a personnel action that Respondents have processed as an involuntary transfer. Accordingly, we decline to take official notice of the Human Resources Handbook definition in deciding this matter.[E]

As there is no available definition of the phrase, "customary orientation for a newly hired worker in the position," we look for guidance from three decisions issued by the Personnel Commission that relate to this topic.

In REIS v. DOT, CASE NO. 83-0002, 0003-PC (PERS. COMM. 9/20/83), the PC considered the phrase "customary orientation" as it is found in the definition of reinstatement which includes certain reappointments to a position in a "class . . . for which the person is qualified to perform the work after the customary orientation provided to newly hired workers in the position." Sec. Pers 16.01(1), Wis. Adm. Code (1983). Ms. Reis had obtained permanent status in class with the Department of Health and Social Services as a (correctional) Officer 3 before she took a voluntary demotion in February of 1982 to a position assigned to the Enforcement Cadet classification as part of the training class in the Department of Transportation's State Patrol Academy. After she had successfully completed her course of training as a cadet, Ms. Reis was appointed to a DOT position as a Vehicle Inspector 1 and shortly thereafter to a Trooper 1 position in the transaction that was the subject of the appeal. DOT characterized the final appointment as a reinstatement, while Ms. Reis contended it was a promotion. The PC held it did not satisfy the "customary orientation" language of a reinstatement because appointment to the Trooper 1 classification required the new employee to have already successfully completed the Enforcement Cadet courses at the Training Academy.

[E] The Commission has modified this paragraph to better reflect its analysis of the notice question. While the Commission does not take official notice of the Handbook definition, we do take notice that the phrase "customary orientation for a newly hired worker in the position," or an approximation thereof, appears 21 times in the rules of the Office of State Employment Relations and the Division of Merit Recruitment and Selection. The phrase appears in the context of numerous types of personnel actions: reinstatement, restoration, transfer, layoff (including Sec. ER-MRS 22.04, Wis. Adm Code, i.e. limited term, project and probationary employees must be terminated before anyone in a permanent position who could perform the duties after receiving "customary orientation" is laid off), and career executive reassignment (Sec. ER-MRS 30.07(1), Wis. Adm. Code).

The second case arose from a hiring decision. In JENSEN V. UW-MILWAUKEE, CASE NO. 86-0144-PC (PERS. COMM. 11/4/87), Ms. Jensen, who worked as an Offset Press Operator 2 with UW-Milwaukee, was not selected to fill a Printing Technician 1 (PT 1) vacancy with the same employer. Historically, the employer had used promotions to fill vacancies at the PT-Trainee class level. However the more advanced PT 1 classification required performance at the objective level after customary orientation.[FT] Ms. Jensen argued that the successful candidate, who had taken more than 13 "hands-on" courses in printing in a Graphic Communications/Printing and Publishing Diploma Program but had not been employed by UW-Milwaukee, lacked the necessary skills to fill the position in question at the objective level. The PC rejected the argument:

> The appellant seems to be arguing that only someone who had previously worked in the Print Shop at the UW-Milwaukee would know enough about the particular system there to allow them to fill the PT 1 position at the objective level. . . . Some form of orientation is inevitable in any new job in order to understand the system of operation. However, there is an important distinction between teaching an incumbent basic knowledge and merely orienting a new employe as to the means of utilizing that knowledge. (Emphasis in original.)

The final case, CHANDLER V. DPI, CASE NO. 81-333 & 82-94-PC (PERS. COMM. 11/17/83), is an appeal from a layoff decision. Appellant had worked in a Management Information Specialist 6 (MIS-6) position in the Department of Public Instruction where he was primarily responsible for coordinating the use of computers by regional data processing service centers and serving as a liaison between those centers and the agency's central office. Chandler indicated a desire to transfer, displace or demote to another position so that he could continue in State service rather than being laid off. The PC examined whether DPI's refusal to hire Mr. Chandler into any one of several vacant positions was contrary to the operative administrative rules. The analysis turned on the question of whether he was qualified for the vacancy if he were to receive "the customary orientation provided to new workers in the position" in order to transfer in lieu of layoff or demote in lieu of layoff. Section Pers. 22.08(1)(a)1. and (3)(a), Wis. Adm. Code (1981). The PC upheld DPI's refusal to permit Chandler to move into any of the following positions: 1) a Food Service Administrator 2 position responsible for the supervision of a food service operation and facilities maintenance where there was no indication that Chandler had any experience in supervision, food service or facilities maintenance; 2) an MIS-3 position that was primarily responsible for computer programming and required knowledge of COBOL where there was no indication Chandler had knowledge of COBOL or skills or experience in programming; 3) an Account Specialist 1

[F] The specific source for this requirement is not apparent from the 1987 decision. Therefore, the weight assigned to the JENSEN decision is arguably less that that of the other two decisions of the PC summarized in this section.

position that required knowledge of financial accounting, where there was no indication Chandler had any such knowledge. Respondent considered Chandler to be qualified for a vacant Equal Opportunity Specialist 4 position but it was offered to someone with more seniority. The PC rejected the argument that "customary orientation" should include certain on-the-job-training:

> [T]his code section does not require the employer to accept a person without the basic knowledge, training or experience and provide him with this basic knowledge, training, and experience while he is on the job. The appellant's interpretation is unreasonable and would certainly not result in the efficient and effective delivery of services by state agencies. (See Sec. 230.01, Wis. Stats.)

None of these cases present facts that are identical to those in the present matter, but when viewed together the three cases supply a framework for determining that Ms. Warren was eligible to transfer into the PA 4 position as provided in Sec. ER-MRS 15.01, Wis. Adm. Code. Ms. Reis contended, and the PC found, that her voluntary appointment to a Trooper 1 position was a promotion that required specific training from a particular entity, DOT's Training Academy. She did not have eligibility from her employment as a correctional officer to reinstate into a Trooper 1 position because at the time she left the Officer 3 position, she had not completed the Enforcement Cadet courses at DOT's Training Academy that were a prerequisite for being hired as a Trooper 1. The JENSEN case also arose from a promotion. The unsuccessful candidate challenged the agency decision because the successful candidate had not worked in the particular agency, although that candidate clearly had the printing knowledge and skills required to perform the work. The successful candidate was not ineligible for hire merely because she did not already know the procedures or policies that were unique to the particular worksite -- knowledge which presumably was supplied as part of the customary orientation provided for such a position. In CHANDLER, an employee facing layoff sought to bump into various professional positions without basic qualifications necessary to perform the assigned duties where the employer would not reasonably be expected to have provided training that encompassed those qualifications to everyone it hired to fill similar positions. DPI would not be expected to provide newly hired Food Service Administrator 2s with basic training in cooking, menu planning and sanitation. Given his apparent lack of experience in these areas, Chandler wouldn't have been able to perform the job with merely the "orientation" that DPI could be expected to provide its new Food Service Administrator 2s. The same thing can be said in terms of Chandler's eligibility for the Account Specialist 2 position. The position required knowledge of financial accounting, Chandler lacked that knowledge, and there was nothing of record to suggest that DPI customarily placed new Account Specialist 2s into a training program that included basic accounting principles. The question of whether Chandler was eligible for the MIS-3 position is somewhat more difficult because he had previously worked at a higher level in the MIS classification series. Once

again, however, the position he sought had a knowledge requirement (COBOL programming), the appellant did not establish that he had knowledge in that area and it was not apparent DPI would customarily provide new employees in the position with training necessary to obtain proficiency in COBOL programming.

The results in these three cases are all consistent with the general concept that "customary orientation" can be of very limited scope for some positions and include extensive training for others.

Many specialized positions in state service correspond to a particular vocational or professional course of study. For example, everyone hired into a typical nursing position can be expected/required to have a professional nursing degree and state agencies that employ nurses cannot be expected to provide new hires with training comparable to the full course of instruction provided in nursing school. It would nevertheless be reasonable for a state agency that regularly hires recent nursing graduates to provide at least some of them with significant training as long as it focuses on those duties that are specific to the position rather than to nurses generally. There are other areas of state employment where the employer cannot expect incoming employees to already possess some areas of knowledge or experience that serve as building blocks for satisfactory performance. The Commission believes that the record in this matter supports the conclusion that the type of persons who might typically be hired into a PA 4 position with the particular duties anticipated to be performed by Ms. Warren would need an orientation that would include very significant training in areas relating to medical and vocational tests, medical terminology and the specific requirements for receiving disability benefits.

Ms. Warren has attempted to establish that the instruction she received from DHFS after the November 2000 personnel action was inadequate to qualify her to perform the duties assigned to the position. The question before the Commission is whether at the point the employer approved the transfer, the "customary orientation" could be expected to provide an employee with Ms. Warren's experience and training enough knowledge to perform satisfactorily. In other words, as of November 2000, should Respondents have anticipated they would need to provide Warren with training beyond the training Respondents would expect to customarily provide a new hire to the same position?

Generally speaking, a Development Specialist obtains appropriate information upon which an Examiner may decide whether an individual applicant is entitled to receive disability benefits. The Development Specialist collects necessary medical, vocational and collateral records. This includes determining what additional information is needed and then requesting it of appropriate personnel or scheduling appointments so that the information can be obtained for the Examiner. The particular position in question was designed to make more medical decisions than had been made by Disability Development Specialists in the past,[3] and was a

[3] Although Respondent had employed Development Specialists in the past on a limited basis, no one was working in that capacity in the DDB at the time of the events in this matter.

combination of duties that had not existed prior to November 5, 2000. Under these circumstances, the "customary orientation" provided to incoming Development Specialists does not equate to the orientation appropriately provided to someone hired into Ms. Warren's Development Specialist "Plus" position.

DHFS acknowledges that the instruction actually provided to Appellant, particularly that relating to medical terminology and medical issues, was somewhat more extensive than had usually been provided to incoming Development Specialists. This fact is consistent with the additional responsibilities assigned to Ms. Warren's position as compared to a Development Specialist position. Sometime after the transfer (and after the DMRS decision that is the subject of this appeal) the responsibilities of the position were changed to eliminate the higher level (or "Plus") responsibilities. Respondent also acknowledges that were someone to be hired now to perform the collection of duties that were assigned to the position at the time of the hearing, the instruction to the new employee would not include much of the medical training that was provided to Appellant.[4] Once again, this fact is consistent with an increased responsibility for making medical decisions than exists in a standard Development Specialist position. The increased responsibility existed at the time of the transfer decision but had been removed by the hearing date.

One difficulty with the present case is the unique nature of the duties assigned to the PA 4 position at the time of the transfer decision. Warren filled the very first Development Specialist "Plus" position so there is no past practice in terms of the orientation provided. However, the Commission does not believe that the use of the term "customary" precludes transfer into a position that is assigned a new and unique set of duties. The Commission believes that in this instance, the employer was in a position to determine eligibility for transfer because there was a "customary orientation" for the closely-related positions of Disability Examiner and Development Specialist. There is nothing of record to suggest that the orientation anticipated for Ms. Warren would not correlate with the orientation provided for these positions. The record shows that DHFS had employed several individuals in the similar but somewhat less complex capacity of Development Specialists and had provided an orientation to the persons hired to fill those positions. The burden in this matter is on the Appellant to demonstrate that her orientation was materially different from that provided to others who filled related positions in the past. Appellant failed to do so.

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[4] Changes were made to Appellant's position in March 2001 to remove the medical decision-making responsibilities. This change was not a reflection on Appellant's performance, but was based on a determination by DDB that the "experiment" to utilize a Development Specialist "Plus" was not working for the agency and should be ended. Appellant contends that the efficiency of the unit decreased when she was performing the "plus" work. We make no finding as to whether this was the case, or whether the fact that these duties were subsequently removed from Appellant resulted in an increase in the Bureau's efficiency. In addition, the question of whether the position was properly classified at the PA 4 level, with or without the "plus" aspects, is not before the Commission.

Michael Gourlie, Chief of the Disability Review Section, served as Appellant's new direct supervisor and he drafted the relevant position description. Gourlie was aware of the training that had been provided to prior Disability Development Specialists. However, his hands-on training experience was with Disability Examiners rather than Development Specialists (or a Development Specialist "Plus").

According to Mr. Gourlie, it takes *two years* to train a Disability Examiner to perform at the objective level. Approximately 25% of the new Examiners who are hired promote from clerical positions in the Bureau or elsewhere in state government and management at DHFS has a long history of encouraging the Bureau's clerical employees to move into Examiner positions. Disability Examiners are responsible for both developing a disability file and actually making the disability determination.

The intended responsibilities in the Warren "Plus" position were something more than a Development Specialist but certainly less than a Disability Examiner. The orientation for the new PA 4 position could be expected to be something more than what was provided to Development Specialists but something less than what was provided to Disability Examiners. Given this information and the knowledge that DHFS encouraged persons with a level and type of experience comparable to that of Warren to promote into the higher level duties, and that those clerical employees were able to perform the Examiner duties after the customary orientation provided to newly-hired Examiners, we believe the record supports the conclusion that Warren was reasonably expected to be qualified to perform the work of the PA 4 position after the "customary" orientation/training that could be reasonably expected to be provided to a newly hired employee in the position.

Scope of jurisdiction over constructive discharge claim

Respondents in this matter have denominated the permanent reassignment of Ms. Warren's duties as an involuntary transfer. Appellant, however, contends that it was a constructive demotion. In its November 2001 ruling on Respondent's jurisdictional objections, the Personnel Commission determined, in a 2-1 decision, that it had jurisdiction to review Warren's constructive demotion claim. The majority opinion reviewed the body of precedent relating to allegations of constructive discipline and whether such claims fell within the Commission's statutory authority.

The Commission's jurisdiction in this area is derived from Sec. 230.44(1)(c), Stats.:

> 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.

The November ruling allowed Warren's constructive demotion claim to go forward to hearing based on the reasoning that as to the information provided to the Commission at that time, the permanent personnel decision "appear[ed] to have been taken for disciplinary reasons, and . . . the transaction involve[ed] traditional earmarks of a demotion." However, the PC majority reached this conclusion even though the PA 4 classification and the PA Sup 2 classification are assigned to counterpart pay ranges. As a consequence, the personnel action involving Ms. Warren was inconsistent with the definition of "demotion" established by the following provisions of Sec. ER-MRS 1.02, Wis. Adm. Code (2000):[5]

> **(4)** "Counterpart pay ranges" means pay ranges or groupings of pay ranges in different pay schedules which are designated by [DER] to be at the same level for the purposes of determining personnel transactions.
>
> **(5)** "Demotion" means the permanent appointment of an employe with permanent status in one class to a position in a lower class than the highest position currently held in which the employe has permanent status in class. . . .
>
> **(15)** "Lower class" means a class assigned to a lower pay range.
>
> **(16)** "Lower pay range" means the pay range which has the lesser pay range dollar value maximum when comparing pay ranges not designated as counterparts.
>
> **(33)** "Transfer" means the permanent appointment of an employe to a different position assigned to a class having the same or counterpart pay rate or pay range as a class to which any of the employe's current positions is assigned.

When these provisions are read together, the key distinction between a transfer and a demotion is that a movement into a new position with a classification assigned to the same or counterpart pay range as the former position is a transfer; a demotion occurs when the classification of the new position is assigned to a lower pay range. To the extent the November ruling did not require Appellant to show that the duties assigned to Appellant in the Development position were properly classified at a level assigned to a lower pay range than the pay range assigned to the PA Sup 2 classification, the Commission disagrees with the conclusion reached by that ruling.[F]

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[5] This citation is to the rules promulgated by the Division of Merit Recruitment and Selection. Identical definitions are found in the rules of the Department of Employment Relations (DER) in Sec. ER 1.02, Wis. Adm. Code (2000).

[F] In her objections to the proposed decision, Appellant argued that the "hearing examiner's decision to dismiss the Appellant's appeal denied the Appellant due process of law." This argument does not take into account the hearing examiner's authority to issue only a *proposed* rather than a final decision or the opportunity the Appellant had to object to the proposed decision before the Commission voted on the merits of the case.

The concept of constructive discipline has been relied upon in the past for asserting jurisdiction over certain personnel actions that are not denominated as one of the forms of discipline enumerated in Sec. 230.44(1)(c), Stats., but are similarly motivated and have the same effect on an employee. A leading case on the topic of constructive demotion is COHEN V. DHSS, CASE NO. 85-0214-PC (PERS. COMM. 2/5/87). At page 8, the Personnel 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."

In its November ruling in the present matter, the PC majority relied on its conclusion that the permanent decision regarding Appellant appeared "to have been taken for disciplinary reasons, based on information available to date and upon drawing all inferences in Warren's favor." The majority stated:

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

We note that the Wisconsin Employment Relations Commission, like the Personnel Commission, is an administrative agency and only has those powers which are expressly conferred or which are fairly implied from the four corners of the statute under which it operates. STATE (DEPT. OF ADMIN.) V. IHLR DEPT., 77 WIS. 2D, 126, 136, 252 N.W.2D 353 (1977).

Prior to the Personnel Commission's November ruling, it had consistently relied on the code definition of demotion for interpretation of the undefined term in Sec. 230.44(1)(c), Stats. STACY V. DOC, CASE NO. 97-0098-PC (PERS. COMM. 2/19/98), affirmed by Pierce County Circuit Court, STACY V. WIS. PERS. COMM., 98-CV-0053, 7/9/98; DUSSO V. DER & DRL, CASE NO. 94-0490-PC (PERS. COMM. 7/23/96); DAVIS V. ECB, CASE NO. 91-0214-PC (PERS. COMM. 6/21/94); COHEN V. DHSS, CASE NO. 85-0214-PC (PERS. COMM. 2/5/87). Those rules provide that a demotion does not occur unless there has been a permanent change via appointment to another position in a lower classification. A "position in a lower class" is defined in ER-MRS 1.05(15): "Lower class" means a class assigned to a lower pay range.

Appellant argues that the personnel transaction is a demotion, in part because the maximum pay for the PA 4 position is less than that for a PA Sup 2. Though there is some logic to this argument, the regulations make clear that this argument must fail. Section ER-MRS 1.05(16) defines "Lower pay range" as the pay range which has the lesser pay range dollar value maximum when comparing pay ranges not designated as counterparts. Subsection ER-MRS 1.02(4) defines "Counterpart pay ranges" as pay ranges or groupings of pay ranges in different pay schedules which are designated by the director to be at the same level for the purposes of determining personnel transactions. Here, the parties have agreed that the two classifications of PA Sup 2 and PA 4 are in counterpart pay ranges, making clear that the transaction cannot be a demotion.

Appellant further argues that the loss of supervisory responsibilities and FLSA exempt status make the transaction a demotion. Indeed, the majority opinion in the November ruling identified the loss of supervisory responsibility as a "traditional earmark" of demotion. While some demotions may include the loss of supervisory status, this is not a change that occurs with every demotion. An employee could be demoted from one non-supervisory position into another. A supervisor might be demoted into another supervisory position. The constant in demotions is not the loss of supervisory status, it is in the movement from a position in one classification to a position in another, lower classification, i.e. the two classifications are not assigned to the same or counterpart pay ranges **and** the pay range maximum in the new position is below that of the old position. The loss of supervisory responsibilities, with or without a change in FLSA status, movement into a bargaining unit and movement into a pay range with a lower maximum, is not enough. We acknowledge there is status that accrues to being a supervisor, even at the lowest rungs of the classification ladder. However, loss of such status, without placement in a position in a lower classification, does not constitute a demotion and the Commission lacks jurisdiction to hear an appeal from such a decision.

The removal of supervisory duties and loss of supervisory pay was at issue in MIRANDILLA V. DVA, CASE NO. 82-0189-PC (PERS. COMM. 7/21/83). There, the Appellant was appointed to a position as a Staff Physician with a pay rate that included $1.75 per hour supplemental supervisory pay. He served as the Deputy Medical Director, acting on behalf of the Director in the latter's absence. After approximately two years of service, with no management dissatisfaction with his performance, Appellant was advised that he would no longer serve as Deputy Medical Director and his salary was reduced by $1.75 per hour. The Commission found that it had jurisdiction over the appeal as a reduction in base pay rather than as a demotion due to loss of supervisory duties. In the instant case, Warren has suffered no reduction in base pay that could form an alternative basis for our asserting jurisdiction.

In COHEN V. DHSS, CASE NO. 85-0214-PC (PERS. COMM. 2/5/87), the employee was moved from his position as Director of the Bureau of Social Security Disability Insurance (BSSDI) to a position of Director of the HMO/AFDC Project. Appellant alleged that the personnel transaction was a demotion because the HMO/AFDC Project Director position had less status, job security, authority and management responsibility even though both positions in question were allocated to the same pay range. The Commission determined that "a demotion does not

occur unless the employe is assigned responsibilities that cause his (new) position to be classified at a lower level than the position he held previously." COHEN, page 5. The Appellant in COHEN also argued that even if the BSSDI Director and HMO Project Director positions were properly classified at the same or comparable classifications, the transaction was a demotion because "his salary advancement potential was limited in the latter job simply by its short term nature." The Commission refused to interpret the term "demotion" so broadly as to include a reduction in salary advancement potential, and we see no reason to deviate from that position now.

In issuing its November ruling on the motion to dismiss, the Personnel Commission had to view the facts in the light most favorable to the Appellant. In so doing, the members of the Commission, including the dissent, felt that the permanent decision to place Appellant in the PA 4 position "appears to have been taken for disciplinary reasons." Accordingly, the majority held that "Warren's constructive demotion claim should be allowed to go forward to hearing where the permanent decision appears to have been taken for disciplinary reasons, *and* where the transaction involved traditional earmarks of a demotion." WARREN, AT P. 10. We find this holding to be an erroneous reading of COHEN, SUPRA. which clearly states, at page 7:

> In order to avoid possible confusion, it should be emphasized that a constructive demotion requires more than merely a movement of the affected employe to a position that is ultimately determined to have a lower classification than the employe's original position. There also must be an intent by the appointing authority to cause this result and to effectively discipline the employe. Certainly not every employe who is transferred into a position which ultimately may be downwardly reclassified has been subjected to a constructive demotion. . . (emphasis added)

The Commission concludes that it should apply the Civil Service code's definitions of transfer and demotion when interpreting the scope of its authority in this matter. By doing so, the Commission is aware that there may be unusual circumstances in which it may not be constrained by definitions found in the rules when construing a claim of a constructive disciplinary action under Sec. 230.44(1)(c), Stats. Contrasting circumstances are reflected in the PC's decision in DAVIS V. ECB, Case No. 91-0214-PC (Pers. Comm. 5/14/92). In that matter, Ms. Davis had permanent status in a 75% Administrative Assistant 3 position and claimed a constructive layoff when her hours were reduced:

> Appellant's theory that this case involves a layoff has two bases. The first is the reduction in her position's hours from 75% to 50% of full time. Section ER-Pers 1.02(11), Wis. Adm. Code, defines "layoff" as: "the termination of services of an employe with permanent status in class from a position in a layoff group approved under s. ER-Pers 22.05, in which a reduction in force is to be

> accomplished." While appellant's position was not in an approved layoff group, this is not fatal to her contention that she was subjected to a de facto layoff. At the very least she has alleged a constructive layoff. If this rule were interpreted to require the existence of a layoff plan and the creation of a layoff group as an absolute requirement before a termination in services or the basis of a reduction in force could be considered a layoff, this would lead to the manifestly absurd result that an agency could eviscerate an employe's rights in a layoff situation under Sec. 230.34, 230.44(1)(c), Stats., and Ch. ER-Pers 22, Wis. Adm. Code, by failing to comply with the requirement set forth in Sec. ER-Pers 22.05 of preparing and obtaining approval for a layoff plan, and then arguing that there was no layoff because no layoff group had been established.
>
> The more significant question is whether a permanent reduction in hours from 75% of full time to 50% of full time can be considered a "termination of services of an employe . . . from a position." Sec. ER-Pers 1.02(11), Wis. Adm. Code. "Terminate" is defined as "to end formally and definitely . . . to discontinue the employment of." Webster's Third New International Dictionary, 2359 (1981). Since after such a reduction in hours as occurred here, the employe's services in the position have not been "terminated" but only reduced, it is difficult to perceive how this transaction satisfies the definition of a layoff.
>
> Appellant argues that such a result "creates a second class civil service status for part-time permanent classified employes. The legislature cannot have intended or permitted the creation of such a status for part-time employes." However, general expressions of legislative policy are insufficient to overcome the barrier erected by the plain language of Sec. ER-Pers 10.2(11). . . .

The constructive layoff analysis in DAVIS applied that portion of the definition of "layoff" in the administrative rule referencing a "termination of services" but declined to apply other portions of the same definition mentioning an "approved" layoff group and plan.

In the instant appeal, the administrative rules draw a very clear distinction between demotions and transfers when it comes to describing an employee's movement between positions in counterpart pay ranges. The movement from one position to a second position that is in a lower classification is a demotion, while the movement into a position assigned to a counterpart pay range is a transfer. This distinction is comparable to the reference to "termination of services" that is found in the definition of layoff that was the subject of the DAVIS decision. It is quite different from the eviscerating reference to an "approved" layoff group that is found in the definition of layoff.

In some constructive demotion cases it is unnecessary to show an actual change in classification to a lower class. However, there must be a showing that duties assigned to the new collection of duties are better described at a classification that is not assigned to a counterpart pay range to the pay range assigned to the previous set of duties. Only if the pay ranges are not counterparts does the definition of demotion allow comparison of the pay range dollar value maximums of the two classifications.

We read COHEN, *supra* to require a two-fold analysis in order to establish a constructive demotion: First, there must be a determination that a demotion has occurred, however it is denominated by the Respondent, in the sense that the new set of duties must be better described in a lower classification (rather than a classification assigned to a counterpart pay range) than the old set of duties. Second, there must be a finding that the action was taken for disciplinary reasons.

The record in the present case does not include the Program Assistant classification series and there is no other evidence to indicate the Development position was more accurately described in a lower class than PA Sup 2. Because we find that Warren's PA 4 position was not in a lower class, we do not reach the question of whether the personnel transaction was taken for disciplinary reasons and Respondents' decision to involuntarily transfer the Appellant is affirmed.

Dated at Madison, Wisconsin, this 22nd day of December, 2005.

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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