STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JAMES S. THIEL, Appellant,

v.

Secretary, WISCONSIN DEPARTMENT OF TRANSPORTATION, Respondent.

Case 663
No. 64379
PA(dmrs)-5

Decision No. 31725-A

JAMES S. THIEL, Appellant,

v.

Secretary, WISCONSIN DEPARTMENT OF TRANSPORTATION, Respondent.

Case 18
No. 65169
PA(sel)-25

Decision No. 31726-A

Appearances:

James S. Thiel, Attorney, appearing pro se.[1]

Lester A. Pines, Cullen Weston Pines & Bach, 122 West Washington Avenue, Suite 900, Madison, Wisconsin, 53703, appearing on behalf of the Department of Transportation.

DECISION AND ORDER

These matters are before the Commission as appeals of personnel actions taken by the Department of Transportation (DOT) relating to James Thiel. The Commission issued an Interim Order on June 27, 2006 that dealt with issues of subject matter jurisdiction and timeliness. Kurt M. Stege of the Commission's staff was designated as the hearing examiner and conducted an evidentiary hearing on the merits of the disputes on February 1 and 2, 2007. The parties filed post-hearing briefs. After the filing of the Appellant's reply brief, the examiner identified an additional topic that had not been fully addressed in the previous submissions. As a consequence, the final brief from the parties was not received until February 8, 2008, and the Appellant filed additional materials as late as February 15, 2008.

[1] Mr. Thiel was represented by Attorney Timothy Edwards during the hearing and until immediately after the first set of post-hearing briefs was filed.

The examiner issued a "provisional proposed decision and order" on May 12, 2008. In a cover letter of the same date, the examiner directed that any request by the prevailing party for fees and costs under Sec. 227.485(3), Stats., be submitted according to statute. Appellant later filed a request and Respondent's response was received on July 3, 2008. The examiner issued a proposed decision on July 23, 2008. Both parties filed objections. After the last response was received, the Commission issued an order on September 16, 2008 that granted a request to file an amicus brief. The brief was received on October 6, 2008.

The issues before the Commission read as follows:

THIEL I (Case 663 No. 64379 PA(dmrs)-5)

1. Whether DOT's action of removing the Appellant from his Attorney-Management position/classification in December 2004 and placing him in an Attorney-Supervisor position/classification constituted a demotion, constructive or otherwise, and if so, whether there was just cause for the action. (Asserted jurisdictional basis is Sec. 230.44(1)(c), Stats.)

2. Whether DOT's action of removing the Appellant from his Attorney-Management position/classification and placing him in an Attorney-Supervisor position/classification was illegal or an abuse of discretion. (Asserted jurisdictional basis is Sec. 230.44(1)(d), Stats.)

THIEL II (Case 18 No. 65169 PA(sel)-25)

3. Whether DOT's decision not to select the Appellant for the position of General Counsel in August/September 2005 was illegal or an abuse of discretion. This claim includes the contention that the DOT violated the prohibition against discrimination in the hiring process based on political affiliations. (Sec. 230.18, Stats.) (Asserted jurisdictional basis is Sec. 230.44(1)(d), Stats.)

The Commission modifies the proposed decision by concluding that we lack subject matter jurisdiction under Sec. 230.44(1)(d), Stats., to review the decision to remove Thiel from the Attorney-Management (Chief Counsel) position. The Commission has made corresponding changes to the Findings of Fact, Conclusions of Law, Order, and Memorandum. The Commission has adopted the proposed decision as to the remaining issues before it, but, because the net effect of the decision is that Appellant is no longer a prevailing party for purposes of awarding fees and costs under Sec. 227.485, Stats., the Commission has also deleted the corresponding Findings of Fact, Conclusions of Law, and portions of the Memorandum. Similarly, we have deleted the portion of the proposed Memorandum that had been titled "Remedy in THIEL I." Other significant changes to the proposed decision are identified in footnotes.

Being fully advised in the premises, the Commission now makes the following

FINDINGS OF FACT

1. The Wisconsin Department of Transportation (DOT), the Respondent in these matters, is a State agency with multiple divisions.

2. The DOT secretary is nominated by the governor and appointed with the advice and consent of the senate.[2] The position is not part of the State civil service.[3] The deputy secretary, executive assistant and the six DOT division administrator positions are also part of the unclassified service.[4]

3. During the relevant time period, Frank Busalacchi served as DOT Secretary, Randy Romanski as DOT Executive Assistant, and Ruben Anthony, Jr., as DOT Deputy Secretary.

4. The position of executive assistant is primarily responsible for communicating between cabinet level agencies and the governor's office, and, among other things, ensuring that the governor's office is aware of agency-related events before learning about them from the media. The deputy secretary position is primarily responsible for internal agency operations.

5. Organizationally, three offices (Office of Public Affairs, Office of Policy and Budget, and Office of General Counsel) and six divisions (including the Division of Motor Vehicles and the Division of State Patrol) report to the secretary.

6. At all relevant times, DOT's office of legal counsel,[5] however that office or function has been officially denominated, has been a separate unit of the agency that reports directly to the secretary or deputy secretary, rather than to one of DOT's divisions.

7. All attorney positions at DOT are part of the classified service.

8. Appellant James Thiel was hired by DOT as a staff attorney in May 1973. There were approximately five attorneys employed by the Department at the time. Three months later, Thiel was promoted into Position Number 033632 as DOT's General Counsel[6] and head of the Office of Advisory Services.

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[2] Sec. 15.05(1)(a), Stats.

[3] Sec. 230.08(1)(b), Stats.

[4] Sec. 230.08(2)(e) and (2)(fs), Stats.

[5] The formal title of the office has not been constant during the relevant period of more than 30 years, even though the function of the office has remained the same. In order to minimize any confusion, this decision often refers to the office simply as the office of legal counsel.

[6] This decision uses the terms general counsel, chief counsel, and chief legal counsel interchangeably.

9. From August 1973 until December 2004, Thiel was responsible for directing all legal work in the department and supervising (either directly or indirectly) all attorneys and support staff in the office of legal counsel. Beginning no later than 2003, Thiel was a member of the agency's "board of directors" that met bi-weekly.

10. As of 2004, Thiel supervised approximately 13 permanent positions. The Office of General Counsel was organized so that Thiel directly supervised Deputy General Counsel Joe Maassen and a program supervisor. The staff attorneys reported to the deputy general counsel and support staff reported to the program supervisor.

11. Thiel's general counsel position was initially assigned to the classification of Attorney 14-Management. The classification of the position was changed to Attorney 15-Management in 1977.

12. At several points between 1977 and 2003, the classification structure for attorney positions in the State civil service was modified. Five differentiated levels (Attorney 11, 12, 13, 14 and 15) were initially reduced to three levels (Attorney 13, 14 and 15) and ultimately, as a consequence of collective bargaining, were replaced by the single level of Attorney. Subcategories of Confidential, Confidential/Supervisor, Management, and Supervisor were retained. The resulting classifications were Attorney, Attorney-Confidential, Attorney-Confidential/Supervisor, Attorney-Management, and Attorney–Supervisor.

13. All five Attorney classifications are in the same pay range.

14. During all relevant times, Thiel's performance evaluations were satisfactory. Mr. Anthony wrote the following performance summary for the year ending in June 2004:

> Jim is a [g]reat attorney. He is dedicated and works extremely hard. He and his staff are very proactive and prompt. Jim and his staff have provided good advice and counsel. He has definitely met performance standards for this evaluation period.

15. Mr. Busalacchi began serving as DOT Secretary in January 2003. When he arrived, he wanted his "own team" at the agency, including his "own" general counsel, and sought advice from the agency's human resources staff in this regard. Susan Christopher, DOT's Human Resources (HR) Director, advised Busalacchi that he could reassign Thiel's duties so that Thiel would no longer serve as Chief Counsel. Between February and May 2003, HR staff drew up documents, including new position descriptions and reassignment appointment letters, which would have permanently reassigned the chief counsel duties to Mr. Maassen and the deputy chief counsel duties to Thiel. The documents were never issued. During meetings with HR Director Christopher in both January and February 2004, Deputy Secretary Anthony discussed a different set of duties, other than chief counsel, for Thiel.

16. Busalacchi told Thiel in 2003 that he was going to reassign him, but took no action that did so at that time.

17. Prior to December 2004, DOT had no centralized process for coordinating responses to open records requests[7] received by the Department. Thiel, as Chief Counsel, had an important role in responding to certain open records requests.

18. DOT directly employed engineers to perform some of the Department's engineering work, but also contracted out some of the same work. DOT's Division of Transportation Districts prepared a cost comparison study (the DOT study) in April 2004 that concluded the cost of having the engineering work performed by State employees was significantly less than the cost of outsourcing the work. The conclusion was inconsistent with the policy goal, expressed by the Governor, of eliminating 10,000 jobs within State government.

19. Lynne Judd is the Administrator of the Division of Transportation Districts.

20. After the study had been prepared in April 2004, DOT received requests for the study, including formal requests under the open records law.

21. At roughly the same time, the State's Department of Administration prepared its own study of the relative costs associated with DOT's engineering work and completed a report (the DOA report) in approximately October 2004.

22. The DOT study and the DOA report were both released on November 11, 2004 in response to an open records request. After the release, DOT staff in the Division of Transportation Districts promptly began preparing a critique (the DOT critique) of the DOA report.

23. Thiel received an open records request for the DOT critique on December 7, 2004.

24. Approximately mid-day on Friday, December 10, Thiel met briefly with Busalacchi and Romanski. Busalacchi supported releasing the DOT critique in response to the open records request and made a comment to the effect that Thiel should work with or work through Romanski when releasing the document. Romanski wanted to notify the Governor's Office because the release was apt to generate inquiries to that Office.

25. After this conversation, Romanski attended some other meetings and upon returning to his office opened an e-mail from Judd indicating Thiel had, in the interim, released DOT's critique. Thiel released the document before Romanski had contacted the Governor's office and before Romanski learned of the release from Judd's e-mail.

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[7] Wisconsin's Open Records Law is found in Sec. 19.31 to .39, Stats.

26. Romanski was angry that Thiel had released the document before Romanski had a chance to contact the Governor's office, contrary to Busalacchi's instructions. On the same day and after speaking with Thiel, Romanski informed Busalacchi of what had occurred.

27. By late in the afternoon on Friday, December 10, Busalacchi understood that Thiel had not followed his directive but had released the document without coordinating with Romanski. Busalacchi was upset with Thiel.

"Temporary reassignment"

28. No later than approximately 8:00 a.m. on Monday, December 13, 2004, Busalacchi called Christopher and told her that it was time to move Thiel and to change the management structure of the Office of Legal Counsel.

29. Within minutes of arriving at work on December 13, Thiel was asked to go to the Secretary's office. Busalacchi told him: "I am removing you as general counsel effective immediately. That's it. That's all I'm saying." Busalacchi promptly issued the following letter to Thiel:

> Effective immediately you will be temporarily reassigned to focus on high-level attorney assignments for the Department. I have decided that during this time you will not serve as Chief Legal Counsel so you can focus on other critical activities.

Thiel's pay was not changed by the temporary reassignment of duties.

30. As a consequence of Busalacchi's action, Thiel immediately ceased participating in meetings of the DOT board of directors. He no longer participated in meetings of the Marquette Interchange Oversight Committee, the Legal Legislative Committee, and with high level administrators, and he was no longer authorized to lobby on behalf of the agency. During a board meeting on December 14, agency policy was changed so that all open records requests submitted to the Department were to be coordinated with DOT's Office of Public Information.

Reorganization and permanent "reassignment"

31. On December 16, 2004, HR Director Christopher signed a Certification Request Report that was a "Request to Initiate Action" for Position No. 033632. The form identified the "Type" of situation as "Replace – Changed Duties" rather than either "New Position" or "Replace – Same Duties." It listed James Thiel, Attorney Management, as the last incumbent, the "Class Title Requested" as Attorney Supervisor, the "termination date" as 12/19/04 and denominated the transaction on the "Report of Hire" line as a "Transfer" of James S. Thiel rather than a "New Original Appt.", "Promotional Appt.", "Reinstate", "Demotion" or "Project Appt." The "comments" line read, in part: "Reassignment of duties." In the "Payroll Authorization" portion of the form, the effective date was identified as December 20, 2004.

32. In a letter to Thiel dated December 17, Deputy Anthony "confirm[ed] your reassignment to the position of Attorney-Supervisor." Thiel's new position description listed the new classification level for Position No. 033632 as Attorney-Supervisor and included the following description in the Position Summary: "Serves as a supervisor in the Office of General Counsel. Assists Office of the Secretary and Chief Legal Counsel with planning, operations, and staffing of the functions and responsibilities of the Office of General Counsel. . . ."

33. By letter dated December 20, Secretary Busalacchi also "temporarily assign[ed Mr. Maassen] to serve as the primary contact for my office in coordinating legal services for the Department of Transportation."

34. The permanent change to Thiel's duties was reflected in a reorganization of DOT's Office of General Counsel that eliminated the position of deputy and created two Attorney-Supervisor positions reporting to the Chief Counsel position. As of December 20, 2004, the organization chart of the Office of General Counsel showed the Chief of Legal Counsel position to be vacant.[8] The same chart showed both Maassen (Position No. 021664) and Thiel (Position No. 033632) at the Attorney-Supervisor level, with four attorneys and all support staff (including the program supervisor position) reporting to Maassen and with three attorneys reporting to Thiel. Prior to this action, Maassen's position as Deputy had been classified at the Attorney-Management level.

35. The duties that were permanently assigned to the new, vacant Chief Counsel position were substantially identical to those duties that had previously been permanently assigned to the position occupied by Thiel.

36. The permanent transaction kept Thiel in the same numbered civil service position but permanently removed his management duties and permanently changed the classification of his position from Attorney-Management to Attorney-Supervisor. The two classifications are assigned to the same pay range and Thiel's pay was not changed. The transaction altered his reporting relationships and placed him a step lower on the organization chart. Rather than reporting to the Deputy Secretary, he reported to the Chief Counsel. Rather than serving as the immediate supervisor to the Deputy Counsel (and as the second or third[9] level supervisor for the rest of the office), he supervised three Attorney positions. Maassen's permanent duties were changed as well, and, like Thiel's position, the classification of Maassen's position was changed from Attorney-Management to Attorney-Supervisor.

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[8] The Chief Legal Counsel position listed on the organization chart had no position number assigned to it but other evidence established that Position No. 024876A, which had previously been an Attorney position occupied by Bill Ramsay, was vacant at that time.

[9] The Commission has added a reference to third level supervisor to more accurately reflect the record.

37. As a consequence of the change in Thiel's duties in December of 2004, a prospective employer would, at least initially, view Thiel's application less favorably and would seek additional information about what had occurred and why.

Permanently filling the position of Chief Counsel

38. DOT engaged in a civil service selection process for filling the vacant Chief Counsel position. The relevant position description read, in part: "Serve as Chief General Counsel for the Department of Transportation. Position directs all legal work for the agency with responsibility for planning, operations, staffing, and general administration of the functions and responsibilities of the Office of General Counsel." The cover sheet to the position description listed Thiel as the previous incumbent.

39. On February 21, 2005, DOT announced that the Chief Counsel position was vacant and established a deadline. Thiel applied for the position on March 7 as a transfer candidate.

40. After having received only one or two applications by the deadline date, DOT re-announced the vacancy on April 18. The agency once again re-announced the vacancy in May and set May 23 as the deadline. After the vacancy had been re-announced twice, putatively because of so few applicants, approximately nine names, including several transfer applicants, were on the certification list developed from the register of applicants.

41. The selection process included two sets of interviews. Secretary Busalacchi did not participate on either interview panel or in developing the selection criteria. Busalacchi was the appointing authority for the vacant position.

42. DOT's HR staff chose the first interview panel that screened the candidates in order to identify those finalists to be interviewed by a second panel.

43. The second interview panel had preset questions and criteria for assessing the candidates. The three interviewers on that panel, one of whom was Deputy Secretary Anthony, assessed the candidates independently, without consultation. The panel identified Robert Jambois as the top candidate, with Thiel second, and presented their conclusion to Secretary Busalacchi who retained the discretion to appoint Jambois or Thiel.

44. Busalacchi interviewed Jambois and did not interview other candidates. He offered the position to Jambois, who accepted.

45. As of the hearing in this matter, Jambois was DOT's Chief Legal Counsel and Thiel was a subordinate, yet supervisory, Attorney.

Based on the above and foregoing Findings of Fact, the Commission makes the following

CONCLUSIONS OF LAW

1. The Commission lacks subject matter jurisdiction under Sec. 230.44(1)(d), Stats., to review the action of removing Thiel from the Chief Counsel position.

2. Appellant is not appealing the decision to select Mr. Maassen (rather than Appellant) to fill the newly created Attorney-Supervisor position that supervised four attorney positions as well as all support staff positions within DOT's Office of General Counsel.

3. Because the Appellant has failed to show that his new duties are properly assigned to a classification in a lower pay range, he has not established a prerequisite for a constructive demotion claim.

4. Appellant has failed to sustain his burden to show that the decision not to select him to fill the vacant Chief Counsel position (THIEL II) was either illegal or an abuse of discretion.

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

ORDER[10]

These matters are dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 16th day of December, 2009.

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

[10] Upon the issuance of this Order, the accompanying letter of transmittal will contain the names and addresses of the parties to these matters and notices to the parties concerning their rehearing and judicial review rights. The contents of that letter are hereby incorporated by reference as a part of this Order.

Wisconsin Department of Transportation (Thiel I and II)

MEMORANDUM ACCOMPANYING DECISION AND ORDER

These cases arise from DOT's action of abruptly removing chief counsel duties from Appellant James Thiel (THIEL I), and the subsequent decision not to hire Thiel when he applied for the position that received those duties (THIEL II). Thiel had served as Chief Counsel for DOT for 31 years, beginning in 1973, and he was consequently in charge of the Office of Legal Counsel. When a new DOT Secretary, Frank Busalacchi, was appointed early in 2003, Busalacchi wanted to give the chief counsel duties to his "own" person, i.e. someone whom he had chosen. He considered whether to flip the duties of Thiel and Deputy Chief Counsel Joe Maassen, but never took the formal steps that would have been involved in doing so. When in December 2004 Thiel did not follow Busalacchi's directive in terms of the procedure for issuing a response to an open records request, Busalacchi became upset and promptly removed, on a temporary basis, Thiel's chief counsel responsibilities. Approximately two weeks later, Busalacchi made the change permanent by assigning the chief counsel responsibilities to a vacant position and reorganizing the Office of Legal Counsel by abolishing the Deputy position, creating two Attorney-Supervisor positions, and assigning Thiel and Maassen to the two positions. DOT later proceeded through a selection process to fill the new Chief Counsel position, with Busalacchi ultimately deciding to hire Robert Jambois, not Thiel.

Before addressing the merits of the claims, we note that Appellant's post-hearing briefs are rife with statements of fact that are not reflected in the record, including references to exhibits that were never admitted into evidence. Our decision in these matters is based solely on the information that is of record.

In addition, Appellant has made numerous requests, in both his initial brief and his reply brief, that the Commission take official notice[11] of specific information. Without delving into the particulars of Thiel's numerous requests, some relate to peripheral topics and many do not fall within the category of "a generally recognized fact or any established technical or scientific fact." Sec. 227.45(3), Stats. Appellant was represented by counsel at hearing. His requests for official notice were voiced after the opportunity for submitting evidence had been completed, rather than during the course of the evidentiary hearing. If the requests were granted, Respondent would be without an opportunity to present related information. Under all these circumstances, we decline Appellant's calls that we take official notice.

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[11] Pursuant to Sec. 227.45(3), Stats:

> 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.

Finally, Thiel's post-hearing arguments repeatedly rely on specific findings of fact that are set forth in the Commission's interim ruling, issued in June 2006, that addressed a motion to dismiss certain parties to the appeal. Those findings were developed solely from written submissions, without the benefit of an evidentiary hearing. Most importantly, the application of the findings was expressly limited in the interim ruling. The Commission explicitly advised the parties of this limitation by including the following footnote: "The findings set out below are made solely for the purpose of ruling on the pending motions." Due to the absence of a stipulation by DOT to adopt the interim ruling's findings at this later stage in the proceedings, we decline to do so.

I. THIEL I

In his first appeal, Thiel is pursuing claims under two distinct jurisdictional provisions: Section 230.44(1)(d), Stats., and Section 230.44(1)(c), Stats. We consider each in turn.

A. Section 230.44(1)(d), Stats.: "related to the hiring process"

The proposed decision concluded that DOT had violated Sec. 230.44(1)(d) by moving Thiel from chief counsel duties to Attorney-Supervisor duties. We conclude that we lack jurisdiction over this claim for the reasons set forth herein.

We begin by reiterating the statement of the issue relating to Mr. Thiel's claim under Sec. 230.44(1)(d), Stats.:

> Whether DOT's action of *removing* the Appellant from his Attorney-Management position/classification *and placing* him in an Attorney-Supervisor position/classification was illegal or an abuse of discretion. (Emphasis added).

The WERC, as an administrative agency, must be mindful of the limits of its statutory jurisdiction. "Any reasonable doubt as to the existence of an implied power of an administrative agency should be resolved against the exercise of such authority." TATUM V. LIRC, 132 WIS. 2D 411, 421 (CT. APP. 1986). The court of appeals has described the subject matter jurisdiction of an agency such as the WERC as follows:

> Subject matter jurisdiction, in general, is the power of a tribunal to treat a certain subject matter in general. . . . [T]he subject matter jurisdiction of administrative agencies – that is, their authority to hear certain subject matters in general – is conferred and specified by statute. *See State v. DILHR,* 77 Wis.2d 126, 136, 252 N.W.2d 353 (1977) (powers of an administrative agency are limited to those expressly authorized or fairly implied by the statute under which it operates). . . . Statutes such as Wis. Stat. §§ 230.44(1) and 230.45(1), which establish the nature of the matters an administrative agency is authorized to hear, define subject matter jurisdiction. . . .

STERN V. WERC, 2006 CT. APP., 193, ¶ 24, 296 WIS. 2D 306, 324-325 (footnote omitted).

Thus, the Commission does not, in the context of reviewing State civil service personnel transactions, have comprehensive authority over all personnel actions, but only over those actions that are specified "or fairly implied" in one of the paragraphs of Sec. 230.44(1), Stats.[12]

We now turn to Thiel's contention that his involuntary transfer from the Chief Counsel position to one of the two newly-created Attorney-Supervisor positions is reviewable pursuant to subsection (1)(d) of Section 230.44. That paragraph empowers the Commission to hear an appeal regarding a "personnel action after certification[13] which is related to the hiring process in the classified service and which is alleged to be illegal or an abuse of discretion. . . ."

The Appellant takes two different approaches in pursuing his (1)(d) arguments. Much of his initial post-hearing brief is premised on the theory that, even though the changed responsibilities occurred 31 years after he was hired into the Chief Counsel position, the changes still "relate to" his 1973 hire. As Thiel now appears to recognize,[14] this approach is untenable in light of Commission precedent. See DVA (DEMOYA), DEC. NO. 31636 (WERC, 3/06) (subparagraph (d) does not confer jurisdiction to review a work assignment occurring at least 11 years after the appellant had been hired into the position).

More difficult to analyze is the Appellant's contention that his movement from the Chief Counsel position to the subordinate position is "related to the hiring process" within the scope of (1)(d).[15] The proposed decision in the instant case viewed the answer to this question as pivoting upon whether the transaction was a "transfer" as opposed to a "reassignment," as the Respondent labeled it. The proposed decision seemed to assume that if it were a transfer, it would fall within subsection (1)(d).

We agree with the conclusion in the proposed decision that the transaction was a transfer for the reasons set forth therein. Briefly restating those reasons, the Respondent moved Thiel from a position with a given set of duties (Chief Counsel for the agency) into a position with considerably reduced managerial and policy-making duties and with more direct

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[12] The other sources of jurisdiction set forth in Sec. 230.45(1) are not the subject of this appeal.

[13] "Certification" is referenced in Sec. 230.25(1), Stats., in the following context:

> Appointing authorities shall give written notice to the administrator of any vacancy to be filled in any position in the classified service. The administrator shall *certify*, under this subchapter and the rules of the administrator, from the register of eligibles appropriate for the kind and type of employment, the grade and class in which the position is classified, any number of names at the head thereof.

[14] In his supplemental reply brief, the Appellant admits that the events in 2004 do not relate to the original hire.

[15] Although Respondent has not addressed this issue in its submissions relating to the objections to the proposed decision, Respondent did explicitly raise jurisdictional objections to Appellant's (1)(d) claim in its post-hearing brief.

supervisory authority (Attorney-Supervisor within the Office of Legal Counsel). The difference in the sets of duties is underscored by the different titles of the two positions and their different classifications, albeit both positions were in the same pay range. Thus, the conclusion that Thiel was involuntarily transferred is consistent with the statutory definition of "position" and the regulatory definition of "transfer," as explained in the proposed decision.[16] The proposed decision properly noted that neither the position number nor the terminology that Respondent applied to the transaction are dispositive as to whether the event is reviewable under subsection (1)(d). DOT (GOGGIN), DEC. NO. 31153 (WERC, 11/04).

Having concluded that Thiel had been involuntarily transferred, however, the proposed decision asserts somewhat abruptly that the transfer "included [Thiel's] appointment to a new position" and therefore the transaction as a whole fell within subsection (1)(d). On that basis the proposed decision undertook a substantive review of DOT's reasons for removing Thiel from his Chief Counsel position and ultimately concluded that one of those reasons was "illegal or an abuse of discretion." We part company with the proposed decision as to our (1)(d) authority to review the bona fides of an appointing authority's decision to involuntary remove an employee from a position in connection with a transfer. We set aside the analysis and conclusions in the proposed decision regarding the lawfulness of DOT's motives in removing Thiel's Chief Counsel duties and do not reach that issue.

We agree that the transaction as a whole included an appointment – placing Thiel in one of the newly created Attorney-Supervisor positions. However, as the statement of the issues set forth above clearly reflects, a transfer decision involves two distinct elements: a *removal* from one position (set of duties), on the one hand, and a *placing into* (appointment to) a different position, on the other. As will generally be true in cases where an appellant objects to an involuntary transfer, Thiel does not challenge the propriety of DOT's decision to appoint him to the Attorney-Supervisor position as such. For example, he does not contend that DOT should have hired someone else for that position, that he himself was not a qualified candidate, or that the selection process for the new position was otherwise flawed. Rather, Thiel is challenging DOT's grounds for *removing* him from the Chief Counsel position. To be sure, the removal is what made Thiel available for the new position. Nonetheless, our (1)(d) jurisdiction does not give us authority to examine how individuals become available for the selection process (whether by layoff, by reinstatement eligibility, by certification, by voluntary demotion, or by involuntary removal from a different position). To the contrary, as discussed below, our review of the purposes and structure of Section 230.44 as a whole, and of precedent developed under that section, compels the conclusion that we lack jurisdiction to review decisions to remove duties from an employee except in the limited situations covered by

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[16] "Position" is defined in Sec. 230.03(11), Stats., as "a group of duties and responsibilities in either the classified or the unclassified divisions of the civil service, which require the services of an employee on a part-time or full-time basis." "Transfer" is defined in Sec. ER 10.02(46), Wis. Adm. Code, as "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."

subsections (1)(a) or (1)(c) of Section 230.44. Our (1)(d) jurisdiction over transfers is

restricted to the bona fides of the hiring/selection aspect of the transfer – in this case the propriety of DOT "hiring" or "selecting" Thiel for the Attorney-Supervisor position. As Thiel does not challenge that aspect of the transaction, we lack (1)(d) jurisdiction over his claim.

Turning first to the overall structure of the civil service statutes in general and Section 230.44 in particular, we note that the relevant statutes as they existed prior to the major revisions in Chapter 196 of the Laws of 1977 were both broader and less precise regarding the kinds of personnel actions that were subject to appeal. In the former law, there were two basic categories of appeal rights. One included "just cause" for discipline and layoff, similar to the coverage of current Sec. 230.44(1)(c), Stats. The other category gave civil service employees a right to appeal ". . . personnel decisions made by appointing authorities when such decisions are alleged to be illegal or an abuse of discretion. . . ." Section 16.03(4)(a), 1972 Stats. The most analogous provision to the latter category of appeals is contained in the current appeal language of Sec. 230.44(1)(d), but the current (1)(d) language limits appeals to personnel actions that are "*related to the hiring process.*" (Emphasis added). Section 230.44 contains other jurisdictional categories, but, to the extent any of them apply to actions of appointing authorities, they pertain to very specific actions. There is no longer any general appeal right for State civil service employees as to generic "personnel decisions by appointing authorities" as was contained in the prior law.

It is also instructive that the current statutes and regulations place very little substantive restriction upon appointing authorities in regard to transferring employees. The statutes require all transfers to be approved by the Division of Merit Recruitment and Selection (DMRS) Administrator (or delegatee). See Sec. 230.29(1), Stats.: ". . . a transfer may be made from one position to another only if specifically authorized by the administrator." However, DMRS regulations very strictly limit the Administrator's discretion regarding approval: "The administrator *will* authorize a transfer . . . providing . . . that the position to which the employee is transferring is assigned to a class in the same or counterpart pay rate or pay range to which any of the employee's current positions is assigned. . . ." (Emphasis added). Sec. ER-MRS 15.02, Wis. Adm. Code. See also 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." The Commission has appeal jurisdiction under Section 230.44(1)(a) to review "personnel decision[s] made by the administrator [or delegatee]" but the Commission has traditionally taken a very narrow view of its authority under this subsection: "Such review is limited to the issue of whether the transaction satisfies the criteria set forth in the relevant statute and administrative rules." Warren v. DHFS & DMRS, Case No. 00-0147-PC (Pers. Comm. 11/12/2001) (citations omitted). As to transfers, whether voluntary or not, the Commission's review under subsection (1)(a) is limited to the narrow question of whether the transferred individual was qualified to perform the work after customary orientation and whether the before-and-after positions are in the "same or counterpart pay ranges." DHFS & DMRS (Warren), Dec. No. 31215-A (WERC, 12/05).

In contrast, the Commission has specifically been given authority to review the actions of appointing authorities when "reassigning" employees in the career executive program. Such reassignments are defined to include lateral transfers as well as demotions. Sec. ER-MRS 30.07(1). Pursuant to express regulatory language, employees may appeal such actions to the Commission if the action is alleged to be "an unreasonable and improper exercise of an appointing authority's discretion. . . ." Sec. ER-MRS. 30.10(2). There is no parallel to this express authority over transfers of non-career executive state employees, such as Thiel here.

Thus the current statutory and regulatory scheme, including the Commission's appeal authority, gives substantial discretion to appointing authorities in deployment of staff, including transfers.[17] Thiel has not challenged the DMRS Administrator's approval of his transfer under subsection (1)(a),[18] and it appears clear that the transfer would satisfy the requirements of ER-MRS 15.01 and 15.02, Wis. Adm. Code., in that Thiel was moved into a position within the same or counterpart pay range and was qualified to perform the work of the new position after customary orientation. Thus, while not raised here, there would seem to be little doubt that the transaction met the limited statutory and regulatory requirements for approval.

The Commission's narrow authority over staffing decisions by appointing authorities stands out even more when contrasted with the Commission's wide authority to review various forms of adverse action taken by appointing authorities toward State civil service employees with permanent status in class. Section 230.44(1)(c) authorizes the Commission to determine whether an appointing authority had "just cause" to take certain specified adverse actions, i.e., demotion, layoff, suspension, discharge or reduction in base pay.[19] Given the specificity in this enumeration, the Commission has consistently refused to assert authority over other types of adverse action. For example, the Commission lacks jurisdiction to review written

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[17] We also note that transfers, like reassignments, are a management right pursuant to Sec. ER 46.04(2)(d), Wis. Adm. Code, and thus are not subject to the non-contractual grievance procedure, in which the Commission serves as the final step. Sec. 230.04(14), Stats. Transfers that are subject to language in a state employee collective bargaining agreement are also entirely outside the Commission's jurisdiction. GANDT V. DOC, 93-0170-PC (PERS. COMM. 1/11/1994).

[18] Thiel's appeal, in its original form, had included an allegation under subsection (1)(a), which he subsequently withdrew in favor of a claim under subsection (1)(b) that OSER had improperly approved the Attorney-Supervisor classification of his new position, which would fall under that subsection. In an earlier decision in the instant litigation the Commission dismissed the (1)(b) claim against OSER. DOT, OSER, & DMRS (THIEL), DEC. NO. 31725 and DEC. NO. 31726 (WERC, 6/06).

[19] Subsection (1)(c) provides the appeal forum for the substantive rights set forth in Sec. 230.34(1)(a). The latter provision, however, uses somewhat different terminology, viz., "*removed*, suspended without pay, discharged, reduced in base pay or demoted" (emphasis added). It may be unclear what "removed" means in the context of Sec. 230.34(1)(a), Stats., but we note that removal is not one of the specific adverse actions that are appealable under Section 230.44(1)(c), Stats.

reprimands. DOC (GARCIA), DEC. NO. 32890 (WERC, 9/09), and cases cited therein. Involuntary transfers can be "adverse action" even if not labeled or intended to be disciplinary. Such events may give rise to employment discrimination claims or other causes of action. However, the Legislature has not included involuntary transfers among the enumerated adverse actions that may be appealed to the Commission under (1)(c). Given the specific reference to "reassignment" and "transfer" as forms of adverse action for the purpose of pursuing a claim under Subch. III of Ch. 230,[20] it is significant that the Legislature has withheld similar authority from this Commission.[21] Since we clearly lack authority to determine whether or not DOT had just cause to impose this involuntary transfer upon Thiel, it strikes us as somewhat anomalous to construe subsection (1)(d) to give us authority to review that decision.

It is in this context, where the Legislature has withheld direct substantive review over involuntary transfers and provided extremely limited oversight of appointing authorities' transfer decisions in general, that we now turn to examine our jurisdiction over Thiel's claim under the specific language of subsection (1)(d). As the Commission has stated, this paragraph "typically serves as the vehicle for obtaining review of *selection* decision[s]," ARENZ, ET AL. V. DOT & DER, CASE. NOS. 98-0073-PC, ETC. (PERS. COMM., 2/10/1999) (emphasis added). Such review includes "the appointing authority's decision as to whom to appoint to a vacancy and the determination of the employee's initial incidents of employment, e.g., starting salary." DEPPEN V. DILHR & DER, CASE NO. 91-0083-PC (PERS. COMM., 3/5/1992). It also allows review of the decision to rescind a job offer. STATE PUBLIC DEFENDER (HARRSCH), DEC. NOS. 32375, 32376 (WERC, 3/2008). It does not, however, include the appointing authority's decision to terminate a probationary employee (i.e., to deny permanent status). BOARD OF REGENTS V. PERSONNEL COMMISSION, 103 WIS.2D 545, 559 (CT. APP. 1981).

Importantly, in the present context, subsection (1)(d) does not include authority to review the motives or grounds for the appointing authority's decision about *how* to fill a position – whether, for example, to use transfer, reinstatement, or open examination. That preliminary decision has long been held to be within the nonreviewable discretion of the appointing authority and not "related to the hiring process" under subsection (1)(d). SEE, E.G., UW (SEARS), DEC. NO. 30794 (WERC, 3/04) and decisions cited therein. Here, therefore, DOT's preliminary decision to realign the office structure and create the two new supervisory positions, as well as DOT's decision to fill those positions by means of transfer, are not subject to Commission review under any subsection of Sec. 230.44.

It is also important that, with one exception addressed below and those cases addressing the initial incidents of employment, the Commission has previously asserted (1)(d) jurisdiction

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[20] Jurisdiction over such "whistleblower" claims rests with the Equal Rights Division of the Department of Workforce Development.

[21] Thiel has, however, raised a (1)(c) claim in THIEL I that the Respondent's involuntary transfer actually amounted to a constructive demotion without just cause, a contention that is addressed later in this decision.

only where the challenge has been to an appointing authority's decision *not to select* particular individual(s) for a position. As to such "non-selection" decisions, the Commission has construed its jurisdiction to encompass any type of non-selection, from non-selection after an open examination to refusals to reinstate and denials of transfer requests. SEEP V. DHSS, CASE NOS. 83-0032-PC, 83-0017-PC-ER (PERS. COMM. 10/10/1984); WING V. DER, CASE NO. 84-0084-PC (PERS. COMM. 4/2/1985); PETTAWAY V. DPI, CASE NO. 01-0013-PC (PERS. COMM. 9/23/2001); DOT (GOGGIN), DEC. NO. 31153 (WERC, 11/04).[22] By the same token, the Commission has on several occasions, albeit without much reasoning, refused to assert (1)(d) jurisdiction where the appeal was from an involuntary transfer rather than a refusal to hire or select. See, MILLER V. DHSS, DEC. NO. 81-137-PC (PERS. COMM. 10/2/1981); FORD V. DHSS & DP, CASE NOS. 82-243-PC, 83-0011-PC, 83-0020-PC (PERS. COMM. 6/9/1983); WITT V. DILHR & DER, CASE. NO. 85-0015-PC (PERS. COMM. 9/26/1985). Indeed, stretching the scope of (1)(d) to include a *removal* of responsibilities is analogous to the unsuccessful effort in BOARD OF REGENTS V. WISCONSIN PERS. COMM., 103 WIS. 2D 545, 558-59, 309 N.W.2D 366 (CT. APP. 1981) to use (1)(d) to encompass an appeal from a decision to terminate a probationary employee: "We decline to equate the hiring process by which one's employment is engaged to the firing process by which one is discharged from employment because to do so would not employ the common and approved usage (sec. 990.01(1)) of the term 'hiring process.'"

Thiel aptly points out that the Commission has in once instance relied upon subsection (1)(d) to review the propriety of an appointing authority's involuntary transfer decision in a case with similarities to this one. KELLEY V. DILHR, CASE NO. 93-0208-PC (PERS. COMM. 2/23/1994), arose from a decision in October of 1993 to appoint Gregory Frigo as the Director of the Bureau of Legal Affairs (BOLA), and the simultaneous decision to designate Glenn Kelley as the Deputy Director of the same bureau. Frigo had been Director until 1990, when he accepted an appointment to an unclassified position in a different division of the same department. The department hired Kelley to fill the Director vacancy and he remained in the position until 1993. In August of that year, the department created an additional position of Deputy Director. It was classified at the same level, Attorney 14-Management, as the Director position. Frigo returned to the agency and was first placed into the Deputy position. Then, on October 17, 1993, without consulting Kelley, the agency "reassigned" Frigo from Deputy Director to Director and "reassigned" Kelley from Director to Deputy Director. The Commission held that the October 17 transaction could be reviewed as a transfer under subsection (1)(d).

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[22] In expanding non-selection jurisdiction under (1)(d) to cases arising outside of an open selection process, the Commission construed the phrase "*after certification*" to "refer to a certain segment in the appointment process." WING, SUPRA. The Commission explained in WING that the Legislature could not reasonably have intended the Commission to oversee the selection process only where the appointing authority had decided to use open examination rather than to make its selection decision by transfer, reinstatement, or voluntary demotion. Thus the Commission held that selections of those types were reasonably implied within subsection (1)(d).

The proposed decision in the instant case relied on general language from KELLEY to serve as the underpinning for examining DOT Secretary Busalacchi's decision to transfer Thiel. On closer scrutiny, however, we believe that the 1994 ruling in KELLEY reached the correct jurisdictional result given the particular facts of that case, but for the wrong reason. Given key factual distinctions between KELLEY and the instant case, the jurisdictional conclusion reached in KELLEY does not apply here.

We acknowledge that the KELLEY ruling spoke in terms of reviewing the decision to transfer Kelley out of the BOLA Director position. However, KELLEY would have been more correctly analyzed in terms of DILHR's decision to select Frigo rather than Kelly for the BOLA Director position. Frigo had been occupying the Deputy Director position for several months and Kelley had served as Director since Frigo's departure as Director in 1990. Both individuals were clearly qualified to serve as Director, but DILHR selected Frigo rather than Kelley. In its decision on the merits of the case,[23] the Commission considered whether DILHR had a reasonable basis for relying on certain factors that led to the conclusion that Frigo should occupy the Director position. The focus of the case was upon whether the appointing authority acted rationally in making its *selection* decision, i.e., in hiring Frigo as the Director. Viewed as a selection decision, KELLEY is squarely in line with the policies and precedents discussed above. To the extent the language in KELLEY suggests that the Commission has (1)(d) jurisdiction over the decision to *remove* an appellant *from* a particular set of duties, that language (though not the result), is inconsistent with the specific limitation of (1)(d) to personnel actions that are "related to the hiring process."

In terms of (1)(d) jurisdiction, Thiel is not in the same posture as Mr. Kelley. Kelley in essence competed for the BOLA Director position and lost out to Mr. Frigo, just as in THIEL II Mr. Thiel competed months later for the Chief Counsel position and was not selected. Accordingly, just as the Commission has (1)(d) jurisdiction in THIEL II, the Commission had (1)(d) jurisdiction in KELLEY, albeit on a more precise analysis than the Personnel Commission set forth in that case.[24]

Similarly, even though KELLEY, under the corrected analysis set forth herein, does not grant Thiel a basis for reviewing his removal from the Chief Counsel position, Respondent's

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[23] KELLEY v. DILHR, CASE NO. 93-0208-PC (PERS. COMM. 3/16/1995).

[24] We also note that KELLEY'S jurisdictional analysis amounts to harmless error, given that jurisdiction ultimately was properly asserted despite the erroneous analysis. RETURN OF PROPERTY IN STATE v. JONES, 594 N.W.2d 738, 226 WIS. 2D 565 (1999), reconsideration denied 230 WIS. 2D 278, 604 N.W.2D 574, CERTIORARI DENIED JONES v. WISCONSIN, 528 U.S. 1143 (2000) (when determining whether the trial court error is harmless, supreme court must determine if there is a reasonable possibility that, but for the error, the result of the proceeding would have been different).

action of placing Maassen rather than Thiel into the Attorney-Supervisor position with second-level supervisory responsibilities is also a non-selection of Thiel that could have generated a

230.44(1)(d) review of that appointment action. However, Thiel has not suggested that DOT's action to select Maassen to fill that position was either illegal or an abuse of discretion. Instead, he objects to losing the Chief Counsel duties in December.[25]

For all of the foregoing reasons, we conclude that the action of removing Thiel from the responsibilities of Chief Counsel for the agency was not a personnel action after certification which is related to the hiring process, so it does not fall within the scope of the Commission's (1)(d) authority.[26]

B. As an appeal of a removal/demotion without just cause

Appellant's second claim relating to the removal of the general counsel duties is that DOT either removed him from his Attorney-Management position or demoted him from the Attorney-Management class to the classification of Attorney-Supervisor when the change in duties became permanent in December 2004. He seeks review of the transaction pursuant to the Commission's authority under Sec. 230.44(1)(c), Stats., to review demotions and certain other forms of disciplinary actions on a just cause standard. That paragraph provides:

> 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.

Removal

Thiel has articulated two separate jurisdictional theories premised on subsection (1)(c). His first theory relies on Sec. ER-MRS 14.03(1), Wis. Adm. Code, which provides, in part:

> (1) Promotion within the same agency. In accordance with s. 230.28(12), Stats., the promoted employee shall be required to serve a probationary period. At any time during this period the appointing authority may remove the employee from the position to which the employee was promoted without the

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[25] If, instead of "reassigning" Thiel to Attorney-Supervisor duties, DOT had chosen to simply exchange Thiel and Maassen between the Chief Counsel and the Deputy Chief Counsel positions, Thiel would have been in the same jurisdictional posture as Mr. Kelley. Under those circumstances and consistent with our KELLEY analysis, Thiel could have pursued a (1)(d) appeal to determine whether the decision to select Maassen for the Chief Counsel position was illegal or an abuse of discretion.

[26] Thiel also relies upon WING V. DER, CASE NO. 84-0084-PC (PERS. COMM. 4/3/1985) and DOT (GOGGIN), DEC. NO. 31153 (WERC, 11/04), for the proposition that the Commission has (1)(d) jurisdiction over the involuntary transfer. As discussed above, however, both cases were premised upon the failure of the respective appointing authorities to select the appellants for positions those appellants sought. As such they do not constitute authority for the Commission asserting jurisdiction over DOT's action in involuntarily removing Thiel from his Chief Counsel position.

> right of appeal and shall restore the employee to the employee's former position . . . . Any other removal . . . during the probationary period shall be subject to s. 230.44(1)(c), Stats. . . .

Thiel contends that in December of 2004, DOT "removed" him from the Chief Counsel position to which he had promoted in August of 1973, thereby providing one basis for the Commission to exercise jurisdiction under Sec. 230.44(1)(c), Stats. However, this contention ignores the express limitation in the rule to those removals that occur *during a probationary period*. Thiel was not a probationary employee in 2004, so the theory fails.

Constructive demotion

Thiel's second (and primary) theory in support of the exercise of jurisdiction under subsection (1)(c) is that the permanent removal of chief counsel duties in 2004 constituted a constructive demotion. As explained in DHFS & DMRS (WARREN), DEC. NO. 31215-A (WERC, 12/05):

> 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.

DOT contends that Thiel cannot be considered to have been constructively demoted because his new classification of Attorney-Supervisor is assigned to the same pay range as the Attorney-Management class and because the term "demotion" is limited by the civil service code to mean the assumption of duties that are assigned to a lower pay range than the appellant's original classification. This contention is premised upon the administrative rules that have been adopted by both the Director of the Office of State Employment Relations (OSER) and the Administrator of the Division of Merit Recruitment and Selection (DMRS).

The OSER Director and the DMRS Administrator have contiguous roles in terms of the civil service laws found in subch. II, ch. 230, Stats. The Director's authority is derived from Sec. 230.04, Stats., which reads, in part:

> (1) The director is charged with the effective administration of this chapter. All powers and duties, necessary to that end, which are not exclusively vested by statute in the commission, the division of equal rights, the administrator or appointing authorities, are reserved to the director.

Pursuant to that authority, the Director has promulgated administrative rules that have, pursuant to Sec. ER 1.01, Wis. Adm. Code, the following force and effect:

> Chapters ER 1 to 47 are promulgated under ss. 230.04(5) and 227.11(2)(a), Stats., to apply specifically to provisions of subchs. I and II of ch. 230, Stats.,

> except on matters relating to the provisions of subch. II of ch. 230, Stats., for which responsibility is specifically charged to the administrator of the division of merit recruitment and selection. . . .

The Administrator's authority is set forth in Sec. 230.05, Stats.:

> (1) All powers necessary for the effective administration of the duties specified for the administrator under this subchapter are reserved to the administrator.

The Administrator has exercised that authority by adopting administrative rules with, as provided in Sec. ER-MRS 1.01, Wis. Adm. Code, the following force and effect:

> Chapters ER-MRS 1 to 34 are promulgated under authority of s. 230.05(5), Stats., and ch. 227, Stats., and approved by the personnel board pursuant to s. 230.07(1)(c), 1987 Stats., to specifically apply to provisions of the civil service law, subch. II of ch. 230, Stats.

The Director and the Administrator have adopted identical definitions of the terms "demotion," "lower class," and "lower pay range." The relevant provisions of the Administrator's rules, found in Sec. ER-MRS 1.02, Wis. Adm. Code, read:

> (8) "Demotion" means the permanent appointment of an employee with permanent status in one class to a position in a lower class than the highest position currently held in which the employee 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.

In its decision in DHFS & DMRS (WARREN), DEC. NO. 31215-A (WERC, 12/05), the Commission reaffirmed the conclusion that a personnel action need not be denominated by the employing agency as a demotion in order to be subject to review under Sec. 230.44(1)(c), Stats., as a demotion. If an agency modifies an employee's duties so they are better described[27] in a lower class and is motivated in doing so by an intent to discipline the employee, the agency may not avoid a just cause review of the action by calling it a mere reassignment of duties. However in WARREN the Commission also made it clear that only those changes in duties that are of a certain nature will be considered a demotion in the context of a constructive demotion claim, irrespective of the employing agency's motivation. The Commission held that for the purpose of pursuing a constructive demotion claim, the degree of the change in duties must still satisfy the standard set forth in the applicable administrative

[27] In a constructive demotion claim, there will only rarely have been a formally recognized change in the civil service classification of the employee's position. Typically, the change in duties is alleged to be such that if the new set of duties would be analyzed for classification purposes, they would be found to be better described in a class other than the one actually assigned to the position.

rule, i.e. the change must be sufficient to classify the new duties in a lower class. A change in duties that does not reach the threshold of justifying placement of the position into a lower class is not sufficient to support a constructive demotion claim.

Thiel raises two distinct contentions that his new duties as supervisor for three DOT attorneys are not properly described in the Attorney-Supervisor class. He takes the position that he spends most of his time in the new position performing the same work his subordinates perform, and argues that by doing so he does not satisfy the standards that were applied in STATE OF WISCONSIN, DEC. NO. 11640-C (WERC, 1/86) for qualifying as a supervisor. That decision arose from a petition, filed pursuant to the State Employment Labor Relations Act, to clarify a bargaining unit. The Commission concluded that because a specific attorney's principal work was not different from that of his subordinates, he was not a supervisor within the meaning of Sec. 111.81(19), Stats., and his position had to be included within the bargaining unit for attorneys. Thiel's appeal is not before the Commission as a unit clarification petition and he has not even placed the Attorney-Supervisor classification specification into the record. Even if Thiel had shown that the Attorney-Supervisor class relies on the definition of supervisor in Sec. 111.81(19), Stats., he has not satisfied his burden to show that his position is better described in a "lower class" than that of Attorney-Management. The parties agree that all positions in the Attorney classification series are assigned to the same pay range, which means that in order to establish a constructive demotion, Thiel would have to show that his position is better described by a specific classification that is outside of the Attorney series and assigned to a lower pay range. Thiel failed to identify an alternative classification and failed to submit classification specifications necessary for concluding that his new duties were better described in a specific classification that is assigned to a lower pay range.

Thiel's second argument relating to the suitability of the Attorney-Supervisor classification for his new duties is that he will no longer qualify as a supervisor once the attorneys he now supervises choose to retire. The argument fails to reflect the fact that supervisory status is based upon subordinate positions, not on the individuals who fill the positions. It also fails to recognize that positions are not classified based on temporary changes. A position which, over time, becomes vacant on a periodic basis is not considered a permanent vacancy for classification purposes, just as taking on some of the duties of a periodically vacant position cannot be considered a permanent responsibility. STENSBERG ET AL. V. DER, CASE NO. 92-0325-PC, ETC. (PERS. COMM. 2/20/1995).

It is undisputed that the Attorney-Management and Attorney-Supervisor classifications are assigned to the same pay range. Thiel admits that the action does not satisfy the definition of "demotion" that is found in the administrative code. Nevertheless, he asserts that given all the circumstances surrounding his case, this definition must not be strictly applied to his claim. In support of his assertion, he has advanced several arguments.

A. "Unusual circumstances"

In its decision in WARREN, the Commission recognized 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." The

Commission went on to analogize to the example provided by DAVIS V. ECB, CASE NO. 91-0214-PC (PERS. COMM. 5/14/1992), where Ms. Davis had permanent status in a 75% Administrative Assistant 3 position and claimed a constructive layoff when her employing agency reduced her hours. The applicable definition of "layoff" referred to termination of services from a position "in a layoff group approved under s. ER-Pers 22.05, in which a reduction in force is to be accomplished." The employing agency had not considered the reduction of hours to be a layoff, so there was never any approval under Sec. ER-Pers 22.05, Wis. Adm. Code, of a layoff group. The Commission held that "[i]f 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 employee's rights in a layoff situation under Sec. . . . 230.44(1)(c), Stats. . . . of preparing and obtaining approval for a layoff plan, and then arguing that there was no layoff because no layoff group had been established." In WARREN, the Commission's reference to "unusual circumstances" was an indication that it recognized, and left intact, the portion of the DAVIS decision that refused to allow an employer to avoid review under Sec. 230.44(1)(c), Stats., by relying on the employer's own failure to satisfy a procedural requirement.

After having expressly identified the exceptional circumstance in DAVIS, the WARREN decision carefully reinforced the requirement that, in order to pursue a constructive demotion claim, an appellant must be able to show that the new duties fall within a lower classification:

> 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. . . . 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.

The reference to "unusual circumstances" in WARREN must be read in the context of both the DAVIS example and the subsequent reiteration of the "lower class" requirement that applies to a demotion in Sec. 230.44(1)(c), Stats. Thiel has not identified a procedural factor comparable to the DAVIS example so the argument that his own situation falls within the "unusual circumstances" exception is rejected.

B. Other arguments

The remainder of Thiel's arguments would essentially require reversal of the Commission's decision in WARREN. However, none of the arguments provide a basis for rejecting the express holding in that decision. Thiel would have the Commission read additional language into Sec. 230.44(1)(d), Stats., giving the Commission jurisdiction to review any employment change that would meet an appellant's own definition of "demotion" and allowing the Commission to disregard the duly adopted definition that is found in the administrative rules. As explained in STATE EX REL. FARRELL V. SCHUBERT, 52 WIS.2D 351, 57-58, 190 N.W.2D 529 (1971):

> [A]dministrative agencies have only such powers as are expressly granted to them or necessarily implied and any power sought to be exercised must be found within the four corners of the statute under which the agency proceeds. . . . [A]ny reasonable doubt of the existence of an implied power of an administrative body should be resolved against the exercise of such authority.

The Commission's authority to review demotions, constructive or otherwise, is premised on Sec. 230.44(1)(c), Stats. Even though ch. 230, Stats., does not include a definition of demotion, the Commission must exercise its jurisdiction in a manner that is consistent with the applicable definition found in the rules of both the Director and the Administrator. Where those rules require the acquisition of permanent duties more properly described in a classification assigned to a lower pay range, we lack the authority to review alleged "demotions" that involve permanent duties in a comparable pay range.

II. THIEL II

The second case filed by Thiel arises from the decision not to select him for the new Chief Counsel position, a vacancy that was first formally announced on February 21, 2005. Robert Jambois was ultimately hired to fill the vacancy.

Prior to hearing, Thiel confirmed that he was pursuing the following claim under Sec. 230.44(1)(d), Stats.: "Whether DOT's decision not to select the Appellant for the position of General Counsel in August/September 2005 was illegal or an abuse of discretion." He specified that his claim included the contention that DOT violated the prohibition against discrimination in the hiring process based on political affiliations that is found in Sec. 230.18, Stats.

A striking characteristic of this case is the minimal amount of relevant information that can be gleaned from the record. We know that the vacancy was re-announced twice after the first announcement generated, according to Thiel, only "one or two" applications. Thiel applied as a transfer candidate. He updated his application after each announcement, and the

final announcement generated a list of eight or nine certified candidates. These candidates went though two sets of interviews before the second panel (which did not include Busalacchi, but was made up of Deputy Secretary Anthony and two other individuals) generated a ranked list of the three top candidates after assessing them independently, without consultation. Robert Jambois was ranked first and Thiel was ranked second.[28] The list was given to Busalacchi, who spoke with Jambois and offered him the position, which Jambois accepted. Busalacchi had the authority to hire any of the top three candidates recommended by the panel. He did not interview Thiel or the third candidate.

The process that was referenced at hearing can be broken down into three relevant components: 1) the recruitment process, including the two re-announcements of the vacancy; 2) the interview process conducted by the second panel, resulting in the ranked list of three; and 3) Busalacchi's decision.

It is not entirely clear from his post-hearing briefs whether Thiel is disputing, under Sec. 230.44(1)(d), Stats., whatever decisions might have been made by DOT relating to whether to make a selection from the applicant list as it existed after the original announcement and whether to make a selection from the applicant list as it existed after the initial re-announcement.[29] The first decision would have been made in March or April of 2005, while the second would have been made in April or May. If he is contending that DOT acted illegally or abused its discretion by deciding not to go ahead and select from either the first or second group of applicants, the argument would relate to decisions that are outside of the scope of the hearing issue which is expressly limited to the "decision not to select . . . in August/September 2005." The scope of our review is dictated by the statement of the issue that was advanced by the Appellant, which only encompasses the selection process that was conducted in August and September.

Typically, the Commission's review of a non-selection case involves evaluating the candidates' responses to interview questions posed by a panel. There are often allegations that

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[28] In his reply brief, Thiel wrote: "The Deputy Secretary stated the numeric ranking was lost after the second interview." In support of this statement, Thiel relies on the following portion of the transcript:

> Q After the interviews were concluded and the choices ranked, what happened with that ranking?
> A I think the ranking, the actual ranking, the numeric part of the ranking might have been lost and you take in, I believe, the top three candidates, and from that, you take the top three candidates in and say, you know, "Here's number one, and what do you think about this, Mr. Secretary?"

The Commission interprets Deputy Secretary Anthony's testimony to mean that he did not know what happened to the numeric ranking, but declines to interpret it as a statement that he had tried to locate the numeric ranking and was unable to do so.

[29] Thiel has failed to even identify the person who made any decisions not to select from the first groups of applicants.

the questions are not job-related or that the panel scored the candidates inconsistently. As already noted, the appellant bears the burden of proof. LAWRY V. DP, CASE NO. 79-26-PC (PERS. COMM. 7/31/1979). Thiel has not clearly articulated any arguments relating to the actions of the interview panel and in any event, there is no evidence that the panel considered factors that it should not have considered or did not consider factors that it should have considered. There is no evidence of the questions that were asked by the panel or of how the panelists evaluated the responses.[30] To the extent he seeks to attack the actions of the interview panel, Thiel has failed to sustain his burden of persuasion.

Thiel appears to focus his attention on the decision by Secretary Busalacchi to select a candidate from the list of three names he received from the interview panel. He argues that this decision was both illegal and an abuse of discretion. When reviewing a selection decision, "it is reasonable to interpret the word [illegal] to refer to an action taken that is contrary to civil service statutes (subch. II, ch. 230, Stats.) or the administrative rules promulgated thereunder." (Citations omitted.) PETTAWAY V. DPI, Case No. 01-0013-PC (Pers. Comm., 9/23/01). In DEPARTMENT OF CORRECTIONS (ZEILER), DECISION NO. 31107-A (WERC, 12/7/04), the Commission applied the following definition of "abuse of discretion":

> An "abuse of discretion" is "a discretion exercised to an end or purpose not justified by, and clearly against reason and evidence." As long as the exercise of discretion is not "clearly against reason and evidence," the commission may not reverse an appointing authority's hiring decision merely because it disagrees with that decision in the sense that it would have made a different decision if it had substituted its judgment for that of the appointing authority. (Citations omitted.)

Thiel has merely established that he was well-qualified for the vacancy and that he made it into the final group of three. He does not account for the fact that Busalacchi had been provided a *ranked* list by the interview panel, and Jambois was the top-ranked candidate.

Thiel suggests that Busalacchi was required to do more than just confer with Jambois before offering him the position, and that he had to interview all three candidates who were on the panel's list. There is nothing in the record to support imposing such a requirement as long as the panel, having already conducted two sets of interviews, ranked the three candidates for Busalacchi and did not designate them as equally qualified. The ranking was, in essence, a recommendation from the panel to Busalacchi that he hire Jambois. While Busalacchi did not have to accept the recommendation, he chose to rely on the ranking and to confirm the

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[30] The testimony of Deputy Secretary Anthony, the only witness who sat on the panel, was that DOT's human relations staff, not Busalacchi, selected the panel and developed the selection criteria. Anthony also testified that he and the other two panelists rated the candidates independently rather than after consulting with each other. There is no evidence that the selection criteria were tailored to avoid hiring Thiel or that the panelists skewed their ratings because they understood Busalacchi did not want to return Thiel to the role of chief counsel.

acceptability of the recommendation by conversing with Jambois. If Jambois had said something during the course of the conversation that raised a concern, Busalacchi could have initiated interviews with all three candidates.

If there had been no ranking by the panel and only one interview by Busalacchi, we would have no basis for upholding his final selection decision. But as long as he received a ranked list, there is no basis on which to conclude it was "clearly against reason and evidence" for Busalacchi to rely on the ranking, speak only with Jambois, confirm he was acceptable and then offer him the position.

Thiel also contends that DOT violated Sec. 230.18, Stats.,[31] by making the selection decision based on political affiliation and age. There is no evidence of record establishing Jambois' political opinions or affiliation or his age, and Busalacchi's statement that he wanted his "own" chief counsel does not show that the interview panel considered any of these factors when concluding that Jambois was their top-ranking candidate.

Because Thiel has failed to show that Busalacchi's decision was either illegal or an abuse of discretion, his claim is rejected and THIEL II must be dismissed.

Dated at Madison, Wisconsin, this 16th day of December, 2009.

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

[31] ". . . No discriminations may be exercised in the . . . hiring process against or in favor of any person because of the person's political . . . opinions or affiliations or because of age. . . ."

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