STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MATTHEW D. KRISKA, Appellant,

v.

Secretary, WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case 52
No. 65809
PA(adv)-98

Decision No. 31796

Appearances:

JoAnne M. Breese-Jaeck and **Anthony P. Hahn**, Hostak, Henzl & Bichler, S.C., P.O. Box 516, Racine, WI 53401, appearing on behalf of the Appellant.

Kathryn R. Anderson, Assistant Legal Counsel, Department of Corrections, P.O. Box 7925, Madison, WI 53707-7925, appearing on behalf of Respondent.

ORDER DISMISSING APPEAL FOR LACK OF SUBJECT MATTER JURISDICTION

This matter is before the Wisconsin Employment Relations Commission on the Respondent's motion to dismiss the appeal for lack of subject matter jurisdiction. The last date for the parties to submit written argument on the motion was July 28, 2006.

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

FINDINGS OF FACT

1. Matthew Kriska was hired as a Correctional Officer in July, 1995 by the Wisconsin Department of Corrections (DOC). He obtained permanent status in class as a Correctional Officer in January, 1996. Subsequently, Mr. Kriska was promoted within DOC to the position of Lieutenant (Supervising Officer 1). The promotion took place in November, 2001.

2. Mr. Kriska was promoted again within DOC in November, 2005 to Captain (Supervising Officer 2) and was required to complete a probationary period of at least six months.

3. On January 11, 2005, during his promotional probationary period, Mr. Kriska was told that there had been some allegations made against him, but he was not provided any details of the allegations. He was removed from his shift immediately. On January 25, 2006, Mr. Kriska was advised that a meeting would take place on January 27 to investigate the allegations that had been raised but he was not provided any additional information about the allegations.

4. The January 27 meeting was led by Security Director Michael Dittman and was eventually identified as an investigation of sexual harassment allegations. It became clear during the course of the meeting that the focus of the investigation was an allegation that Mr. Kriska had asked a subordinate, Officer Love, for a "lap dance." Mr. Kriska disputed the allegation, but he confirmed having made a joke to the effect that he had heard Ms. Love "danced pretty good" after she had danced at a Friday night party. Mr. Kriska acknowledged that the joke may have been inappropriate and confirmed that he would not engage in joking on non-work-related topics in the future. Shortly after the January 27 meeting, Security Director Floyd Mitchell asked Mr. Kriska to attend a second meeting and represented that the investigators simply wanted to wrap-up their work as soon as possible.

5. Mr. Kriska was never provided with any of the findings in the sexual harassment investigation. Instead, he received a February 14, 2006 memo requiring him to participate in a pre-disciplinary interview on February 16 for alleged violations of Work Rules #7 and #13. Aside from inferences gleaned from the questions asked during the prior sexual harassment investigation, Kriska was not given any more specific information about the alleged work rule violations nor was he given any indication of the nature of the discipline being considered.

6. The February 16 meeting took place and was followed by prolonged silence. Mr. Kriska did not receive further information until a letter from Warden John Hutz was hand-delivered to him on March 15, 2006 that read, in relevant part:

> This is to inform you of our intention to end your promotional probation period as a Supervising Officer 2 with the Division of Adult Institution, Milwaukee Secure Detention Facility due to your failure to meet probationary standards. This is due to violation of the following DOC Work Rules:
>
> - Work Rule #7 which states, "Making false, inaccurate or malicious statements about employees, inmates, offenders or the Department."
>
> - Work Rule #13 which states, "Intimidating, interfering with, harassing (including sexual or racial harassment), demeaning, or using abusive language in dealing with others."

> This action is taken pursuant to S. ER-MRS 13.08, Wisconsin Administrative Code, and in accordance with s. 230.28, Wisconsin State Statutes, which provides that you be informed of the reason to remove you from the position during your **promotional probationary period**.
>
> You are afforded the opportunity to respond to the reasons for your removal at a meeting, which has been scheduled for Wednesday, March 22, 2006. . . .
>
> In accordance with ER-MRS 14.03, upon your removal you will be restored to a Supervising Officer 1 position at Milwaukee Secure Detention Facility effective March 26, 2006. (Emphasis in original.)

7. A letter was sent on behalf of Mr. Krisak to Warden Hutz asking that information relied upon for the action be supplied to Mr. Kriska prior to the March 22 meeting, but there was no response.

8. The March 22 meeting was conducted by Colleen Hansen of Human Resources, and Deputy Warden Roberta Gaither. When Mr. Kriska asked for an explanation of the basis for the action, Ms. Hansen indicated that the meeting was not intended to address the substantive basis for decision-making, but she eventually confirmed that the alleged comment to Officer Love was "90% of the reason."

9. By letter dated March 24, 2006, Warden Husz informed Appellant as follows:

> The decision to remove you from your position as a Supervising Officer 2 with the . . . Milwaukee Secure Detention Facility effective March 25, 2006, is justified in my judgment. Specifically and most importantly, your failure to interact appropriately with subordinate staff (e.g., the statements made to a subordinate Officer which occurred on December 15, 2005, in the elevator) is a negative reflection of your performance and the standards you are to uphold as a Supervising Officer 2.
>
> Pursuant to s. ER-MRS 14.03, Wisconsin Administrative Code, you shall be restored to a Supervising Officer 1 position at the Milwaukee Secure Detention Facility effective March 26, 2006. This action is without the right of appeal.
>
> Your rate of pay will be $20.828 per hour and you will not be required to serve a probationary period.

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

CONCLUSION OF LAW

The Commission lacks subject matter jurisdiction over this matter as an appeal filed under sec. 230.44 or .45, Stats.

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

ORDER[1]

This matter is dismissed for lack of subject matter jurisdiction as an appeal filed under Sec. 230.44 or .45, Stats.

Given under our hands and seal at the City of Madison, Wisconsin, this 6th day of September, 2006.

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

[1] Upon the issuance of this Order, the accompanying letter of transmittal will contain the names and addresses of the parties to this proceeding 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.

Department of Corrections (Kriska)

MEMORANDUM ACCOMPANYING ORDER DISMISSING APPEAL

This matter, arising from a probationary termination decision, was filed as an appeal pursuant to sec. 230.44(1)(c), Stats. 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.

Pursuant to the decision of the Court of Appeals in BOARD OF REGENTS V. WISCONSIN PERSONNEL COMMISSION, 103 WIS.2D 545, 309 N.W.2D 366 (1981), this agency, as the successor agency to the Personnel Commission for appeals filed under Sec. 230.44, Stats., lacks subject matter jurisdiction over appeals of probationary termination decisions where the employee is serving an initial probationary period and, therefore, lacks the "permanent status in class" required in Sec. 230.44(1)(c), Stats.

The Commission has held that BOARD OF REGENTS remains applicable and that there is no other jurisdictional basis in Sec. 230.44 and .45, Stats., that is even arguably relevant to an appeal from a termination/discharge during an original probationary period that is filed with this agency. DEPARTMENT OF CORRECTIONS (GOINS), DEC. NO. 30766 (WERC, 1/04).

In the present case, Appellant had been promoted from a Supervising Officer 1 (SO1) position to fill an SO2 vacancy. His probationary period as an SO2 was terminated before he had obtained permanent status in that classification. Upon Mr. Kriska's termination from the SO2 position, Respondent continued his employment by restoring him to a Supervising Officer 1 position. Probationary periods are required for all original appointments as well as all promotional appointments. Sec. ER-MRS 13.03, Wis. Adm. Code. As noted in Sec. ER-MRS 13.08(1), the "appointing authority may dismiss any employee without the right of appeal during the employee's probationary period." The action that was taken by DOC related solely to Appellant's probationary status and it did not interfere with his permanent status in the Supervising Officer 1 classification. Therefore it was not a discharge that could be reviewed by the Commission pursuant to Sec. 230.44(1)(c). The distinction is clarified by Sec. ER-MRS 14.03(1):

> [T]he 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 right of appeal* and shall restore the employee to the employee's former position. . . . Any *other* removal, suspension without pay, or discharge during the probationary period shall be subject to s. 230.44(1)(c), Stats. (Emphasis added.)

Appellant was restored to his former position and there is no indication that the probationary dismissal was accompanied by a suspension, discharge or reduction in the base pay that Mr. Kriska had earned as an SO1. Therefore, the Commission lacks jurisdiction to review the action.

This conclusion is required by DHSS v. STATE PERSONNEL BOARD, 84 WIS.2D 675, 267 N.W.2D 644 (1978) which arose from the decision of the Department of Health and Social Services to terminate the employment of Donald Ferguson. Mr. Ferguson was serving a probationary period in an Information Specialist 3 position after having obtained permanent status in class as a Management Information Specialist 2 with the University of Wisconsin. The supreme court rejected the Personnel Board's[2] determination that it had jurisdiction to hear Mr. Ferguson's appeal of the probationary termination:

> It is undisputed that Mr. Ferguson had not been employed by D.H.S.S. in his new position for the six month probationary period at the time of his discharge. Therefore, he did not have permanent status in class and the board did not have jurisdiction to hear his appeal.
>
> The board admits that Mr. Ferguson did not have permanent status in class in his promotional position, but it claims that he did have tenure rights based on his old position. From this fact, the board argues that Mr. Ferguson could only be discharged without cause from his new position with D.H.S.S. and must be reinstated to a job in his former classification. This argument ignores the requirement of sec. 16.05(1)(e), Stats. [1975],[3] that the board can only hear appeals of employees with permanent status in class. Pers. 13.11, Wis. Adm. Code [1975] defines permanent status in class as,

[2] The State Personnel Board was a predecessor agency to the Wisconsin Employment Relations Commission in terms of the Commission's jurisdiction to review certain state civil service actions.

[3] This provision granted the Personnel Board the authority to:

> Hear appeals of employees with permanent status in class, from decisions of appointing authorities when such decisions relate to . . . discharges, . . . but only when it is alleged that such decision was not based on just cause . . . ."

The language used in the 1975 statute is substantially similar to what is now 230.44(1)(c):

> If an employee has permanent status in class . . . the employee may appeal a . . . discharge . . . to the commission, if the appeal alleges that the decision was not based on just cause.

> ". . . the status of an employee in a position who has served a qualifying period to attain a permanent position for that class."[4]

This definition *requires that status in class relate to a class in which the employee is then serving, not a position in which he has served in the past*.

> Mr. Ferguson did not have permanent status in class as an Information Specialist 3 at the time of his discharge and the board did not have jurisdiction to hear his appeal. 84 WIS.2D 675, 681-2. (Emphasis added.)

Mr. Kriska argues that the supreme court's decision in DHSS (FERGUSON) reflects the conclusion that the court would have allowed Mr. Ferguson to obtain Personnel Board review of the probationary termination decision had he been promoted within one agency rather than between two agencies. The Commission finds no basis for such a conclusion which ignores the court's requirement that "status in class relate to a class in which the employee is then serving, not a position in which he has served in the past." 84 Wis.2d 675, 682. The relevant portion of the court's opinion reads:

> [T]he board could only hear Mr. Ferguson's appeal if he had "permanent status in class" and if it was alleged that his discharge was not for "just cause." In this case the problem phrase is "permanent status in class." Sec. 16.22(1)(a), Stats. 1975 provides that,
>
> > ". . . All original and all promotional appointments to permanent . . . positions in the classified service shall be for a probationary period of 6 months. . . . Dismissal may be made at any time during such periods."[5]
>
> The exception to this rule appears in sec. 16.22(1)(d), Stats., providing that,

[4] "Permanent status in class" is now defined in ER-MRS 1.02(23) [2006] as "the rights and privileges attained upon successful completion of a probationary period required upon an appointment to permanent . . . employment."

[5] This provision is comparable to the current language in Sec. 230.28(1)(a), Stats: "All original and all promotional appointments to permanent . . . positions . . . in the classified service shall be for a probationary period of 6 months. . . . Dismissal may be made at any time during such periods. . . ."

> ". . . (d) A promotion or other change in job status within a department shall not affect the permanent status in class and rights, previously acquired by an employee within such department."[6]
>
> Sec. 16(1)(a) and (d), Stats., requires that promotional appointments in the classified service are subject to a six month probationary period, and possible discharge from the classified service. If an employee is promoted within a department, he may be dismissed from the new position during the probationary period. If dismissal from the new position occurs, the employee must be reinstated to his former position or a similar position within that department. *There is no effect on, ". . . permanent status in class and rights, previously acquired," if the promotion is intra-departmental.* If the legislature had intended a different result they would not have included the words "within a department" and "within such department" in sec. 16.22(1)(d). If the employee is discharged during his probationary period in an inter-departmental promotion, his dismissal results in his discharge from the classified service. (Emphasis added.)

The Appellant attempts to interpret the highlighted language to mean that the court would have allowed Mr. Ferguson to obtain Personnel Board review of the probationary termination decision if he had been promoted within one department. Appellant's interpretation ignores the preceding sentence ("If an employee is promoted within a department, he may be dismissed *from the new position* during the probationary period.") which indicates that the termination of an employee (i.e., dismissal) during the probationary period upon an intra-departmental promotion does not affect the "permanent status in class" that was previously acquired by the employee because he is restored to his former position in the department.

The immediate successor to the State Personnel Board in terms of reviewing discharge actions within the state civil service was the State Personnel Commission which in PHELPS V. DHSS, CASE NO. 85-0193-PC (PERS. COMM. 12/19/85) reaffirmed the applicability of the supreme court's DHSS (FERGUSON) decision and noted: "Regardless of whether an employee is in trainee status, on original probation, or on promotional probation, he or she does *not* have permanent status in class in the classification from which he or she is terminated, and therefore, there can be no jurisdiction for an appeal pursuant to Sec. 230.44(1)(c), Stats." Mr. Phelps had not completed probation after taking an intra-agency promotion from Officer 2 to Officer 3 when his probation was terminated and he was restored to an Officer 2 position.

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[6] This provision is comparable to the current language in 230.28(1)(d): "A promotion or other change in job status within an agency shall not affect the permanent status in class and rights, previously acquired by an employee within such agency."

Mr. Kriska's situation is comparable to that of Mr. Phelps. Both individuals took intra-agency promotions but their probationary periods were terminated before they attained permanent status in class in their new classifications. Neither employee may invoke 230.44(1)(c) to obtain review of the probationary termination decision.[7]

The Appellant also contends that the decision in ARNESON V. JEZWINSKI, 225 WIS.2D 371, 592 N.W.2D 606 (1999) provides a basis for reviewing this matter. Mr. Arneson had been serving a promotional probationary period as a Management Information Specialist Supervisor 4 after having attained permanent status in class as an MIS 3. His employer, the University of Wisconsin, investigated an allegation of misconduct and issued Mr. Arneson a letter of discipline that suspended him for 30 days without pay, demoted him to a classification below that of MIS 3 and reduced his pay from $15.51/hour to $12.659/hour. One obvious effect of the discipline was to terminate Mr. Arneson's probation as an MIS Sup 4. Mr. Arneson appealed the disciplinary action pursuant to Sec. 230.44(1)(c), Stats., and the suspension and demotion were rejected on the grounds that the employer had failed to satisfy the constitutional requirement of an adequate pre-disciplinary hearing. ARNESON V. UW, CASE NO. 90-0184-PC (PERS. COMM. 2/6/92). Mr. Arneson subsequently filed a separate claim under 42 U.S.C. Sec. 1983 that was dismissed on a motion for summary judgment. The section 1983 case found its way to the supreme court. Mr. Kriska contends that the following language from the court's decision in ARNESON requires the Commission to exercise jurisdiction over the action by the Department of Corrections to terminate Mr. Kriska's probationary employment as a Supervising Officer 2 and return him to a Supervising Officer 1 position:

> When Arneson was promoted within [Administrative Data Processing], he had already acquired permanent status in class and rights as an MIS 3 employee and therefore he retained his permanent status pursuant to the dictates of Wis. Stat. Sec. 230.28(1)(d). And as an employee with permanent status in class, the defendants were required to abide by Wis. Stat. Sec. 230.34(1)(a) when they disciplined him, just as they would have been required to do when disciplining any other permanent employee. ARNESON, 225 WIS. 2D 371, 395.

This paragraph cannot be properly interpreted without considering the context provided by the language preceding it which shows the court was referring to discipline that affected Mr. Arneson's MIS 3 rights (i.e., demotion from MIS 3 to Data Processing Operations Technician 4 and reduction in hourly base pay to $12.659), rather than discipline that had an effect on his employment as an MIS Sup 4 (i.e., probationary termination):

[7] If the Commission acceded to Mr. Kriska's arguments, the consequence would be to eliminate the probationary period for employees who are promoted within an agency.

On May 3, 1990, Arneson was informed by letter that he was assigned to a Data Processing Operations [Technician] 4 (DPOT4). There is no dispute that this position was below the position which Arneson held prior to his promotion to MIS 4 supervisor. . . .

Despite the defendants' arguments in both their briefs and at oral argument, we do not understand Arneson to be claiming any [constitutionally] protected interest in his position as an MIS 4 supervisor. Instead, we find that the property interest which Arneson claims is constitutionally protected is related to his employment in the MIS 3 non-supervisor position he held *prior* to his promotion in January 1990.

At oral argument, Arneson admitted that he did not have a constitutionally protected property interest in his MIS 4 supervisory position, which he conceded was a position in which he served as a probationary employee pursuant to Wis. Stat. Sec. 230.28(1)(a) and (am), and therefore, a position in which he had no protection. We therefore direct our discussion to his argument that when he was promoted, he maintained his statutory rights to the position he held prior to the promotion, the non-supervisor MIS 3 position. . . .

The parties here do not dispute that as an MIS 3 employee just prior to his promotion, Arneson did have permanent status in class, and as such, a property interest in continued employment that was protected by the Due Process Clause of the Constitution.

The parties are also in agreement that the property interest an employee has in his or her supervisory position as a probationary promotion employee is governed by Wis. Stat. Sec. 230.28(1)(a) and (am) which together provide that an employee promoted to a supervisory position must serve a one-year probationary period, unless waived after six months, during which time, "dismissal may be made at any time" without cause. Wis. Stat. Sec. 230.28(1)(a) and (am).

The parties' point of dispute is the effect of the promotion, and the accompanying probationary period, on Arneson's property interests in his *pre-promotion* position, the only position for which Arneson is claiming constitutional protection. The defendants argue that when Arneson was promoted from his MIS 3 position to the MIS 4 supervisor position, he forfeited his permanent status that he held as an MIS 3 employee. That is, they argue that Arneson lost the protection of his permanent status with his promotion when he fell subject to the probationary period all promoted employees to supervisory positions are subject to . . . .

The defendants are in error. . . . ARNESON, 225 WIS. 2D 371, 378, 392-94. (Emphasis in original.)

Far from supporting Mr. Kriska's argument, the supreme court's decision recognized the important distinction between a termination of Mr. Arneson's probationary employment as a supervisor and the effect of the suspension and demotion upon those rights he had acquired on attaining permanent status in his former MIS 3 position.

The more important citation in terms of Mr. Kriska's circumstances is to ARNESON V. UW, CASE NO. 90-0184-PC (PERS. COMM. 2/6/92). There, the Personnel Commission explained the source of its jurisdiction over the disciplinary action taken with respect to Mr. Arneson:

> Respondent also argues that appellant is not entitled to be restored to his MIS – Supervisor position by way of remedy, because at the time of his demotion he was serving a probationary period and the Commission lacks jurisdiction over a probationary termination. Sec. 230.44(1)(c), Stats.; BD. OF REGENTS V. WIS. PERS. COMM., 103 WIS 2D 545, 309 N.W.2D 366 (CT. APP. 1981). However, respondent not only terminated his probationary employment as a MIS 4 – Supervisor, it also suspended him for 30 days without pay, reduced his pay rate, and demoted him to a position in a classification with a lower pay range. It is undisputed that the Commission has jurisdiction over this transaction. Section ER-Pers [now ER-MRS] 14.03, Wis. Adm. Code, provides with respect to an employee promoted within the same agency who is serving a probationary period, *inter alia*:
>
> > At any time during this period the appointing authority may remove the employee from the position to which the employee was promoted without the right of appeal and shall restore the employee to the employee's former position or a similar position and former rate of pay . . . . Any other removal, suspension without pay, or discharge during the probationary period shall be subject to Sec. 230.44(1)(c), Stats.
>
> *If respondent had simply terminated appellant's probationary employment as a MIS 4 – Supervisor and restored him to a position in his previous MIS 3 classification, or one in the same pay range, appellant would not have had the rights to have appealed under Sec. 230.44(1)(c), Stats.* However, having gone further than that and effected a transaction cognizable by this Commission, there is no basis for it now to argue that appellant is not entitled to restoration to his previous position. (Emphasis added.)

In contrast to Mr. Arneson, the Department of Corrections terminated Mr. Kriska's probationary employment as a Supervising Officer 2 and then restored Mr. Kriska to a position in his previous classification of Supervising Officer 1, without either suspending him or

demoting him to a lower classification. DOC did not engage in "any other removal, suspension without pay, or discharge" that would have subjected the transaction to review under Sec. 230.44(1)(c), Stats.

Related provisions of the administrative code are consistent with an employer's right to terminate an employee's probationary period upon promotion without a right of appeal. Those employees who serve probation upon transfer between agencies "may be separated from the service without the right of appeal at the discretion of the appointing authority,"[8] as may employees serving permissive probation upon reinstatement[9] or upon voluntary demotion.[10]

The current statutes and administrative rules along with very specific precedent from the supreme court all bar the Commission from asserting jurisdiction over the decision to terminate Mr. Kriska's probationary period as an SO2 and to restore him to an SO1 position.

Because the Commission lacks the authority to hear this matter as an appeal under Sec. 230.44 or .45, it must be dismissed.

Dated at Madison, Wisconsin, this 6th day of September, 2006.

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

[8] Sec. ER-MRS 15.03, Wis. Adm. Code.

[9] Sec. ER-MRS 16.04(1), Wis. Adm. Code.

[10] Sec. ER-MRS 17.04(3)(d).

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