STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

PATRICIA JACKSON-WARD, Appellant,

vs.

Secretary, WISCONSIN DEPARTMENT OF REVENUE, Respondent.

Case 6
No. 66942
PA(adv)-120

Decision No. 32471

Appearances:

Victor Arellano, Attorney, Lawton & Cates, P.O. Box 2965, Ten East Doty Street, Suite 400, Madison, Wisconsin 53701-2965, appearing on behalf of the Appellant.

Mark Zimmer, Attorney, Department of Revenue, Office of the General Counsel, 2135 Rimrock Road, P.O. Box 8907, Madison, Wisconsin 53708-8907, appearing on behalf of the Respondent.

ORDER GRANTING, IN PART, MOTION TO DISMISS

Patricia Jackson-Ward appeals the imposition of two disciplinary actions imposed by the Department of Revenue on March 30, 2007: a written reprimand, and a written reprimand in lieu of a one-day suspension. She contends the actions were taken without just cause. Jackson-Ward also seeks review of a career executive reassignment on March 5, 2007. The Respondent filed a motion to dismiss the appeal for lack of subject matter jurisdiction. Although not indicated by the title of its motion, Respondent also contends that the underlying dispute is moot and that an effort by Jackson-Ward to obtain review of Respondent's action on March 5, 2007 is untimely. The final brief was filed on May 28, 2008.

Having reviewed the record and considered the arguments of the parties, the Commission makes and issues the following

FINDINGS OF FACT

1. Patricia Jackson-Ward was hired by the Wisconsin Department of Revenue (DOR) in December of 2004 as the Human Resources Director in the Department's Enterprise Services Division (ESD). She served as a supervisor for approximately 10 people and she had her own office. The position, assigned to pay range 81-01, is part of the State's career executive program.

2. By letter dated March 2, 2007 and effective March 5, Jackson-Ward was reassigned to a different career executive position, Assistant Human Resource Services Director (also referred to as the Assistant Human Resources Director) that was assigned to the Human Resources Program Officer classification, in the same division.[1] The position was assigned to the lower pay range of 81-02. The letter memorializing this action provided in pertinent part:

> This letter confirms your Career Executive reassignment to a Human Resources Program Officer, Assistant Human Resource Services Director position (pay range 81-02) in the Enterprise Services division effective Monday, March 5, 2007.
>
> This Career Executive reassignment is a permanent civil service movement under the authority of s. ER-MRS 30.07, Wis. Adm. Code. There will be no change in pay as a result of this reassignment and you will not be required to serve a trial period.

Jackson-Ward had no supervisory responsibilities in her new position and she worked out of a cubicle rather than an office. As a result of Appellant's reassignment, the Human Resources Director position was vacant.

3. On March 6, 2007, Jackson-Ward received a written reprimand for insubordination. She is not appealing this personnel action.

4. On March 9, 2007, Jackson-Ward wrote a letter to the Secretary of the Department in which she formally requested "to be reassigned somewhere other than the Enterprise Services Division because of the hostile work environment that currently exists within that division for myself. . . ." On March 13, 2007, Jackson-Ward met with the Secretary about her concerns.

5. On March 30, 2007, the Administrator of the Enterprise Services Division, Kirbie Mack, issued Jackson-Ward two more letters of discipline. Appellant claims the discipline was imposed without just cause.

6. The first letter, "a written reprimand and . . . a letter of instruction" was premised on DOR's conclusion that Jackson-Ward had not recorded periods of absence for December 26, December 27, January 3 and February 1 on the State's Payroll and Time Attendance system.

7. The second letter was based on the conclusion that on January 26, March 8 and March 9, Jackson-Ward had failed to follow a directive to inform her supervisor when she would not be reporting to work. The letter stated, in part:

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[1] Appellant is now seeking review of this action.

> On March 6th, you received a letter of reprimand for the same work rule violation. Therefore, this letter serves as a written reprimand in lieu of a one day suspension for this repeated violation. Continued insubordination and failure to follow instructions will result in escalating discipline, including but not limited to termination.

8. Neither disciplinary action caused a reduction in Jackson-Ward's rate of pay or caused her to lose any pay.

9. If, during her subsequent employment with DOR, Jackson-Ward had engaged in other conduct viewed by DOR as insubordinate, DOR would have considered the second March 30th letter as a one-day suspension for purposes of determining the appropriate level of progressive discipline to impose.

10. On April 27, 2007, Jackson-Ward filed a letter of appeal with the Commission. The letter referenced both March 30 disciplinary letters.

11. Jackson-Ward resigned from DOR effective May 5, 2007 and currently works for the Wisconsin Department of Transportation. Prior to her departure, Jackson-Ward did not receive any further discipline from DOR.

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

CONCLUSIONS OF LAW

1. The Appellant has the burden of establishing that the discipline referenced in the appeal is within the scope of the Commission's jurisdiction under Sec. 230.44(1)(c), Stats.

2. The Appellant has sustained that burden as to the reprimand in lieu of a one-day suspension, but not as to the reprimand.

3. The Commission lacks the authority to review the letter of reprimand alleging unrecorded absences.

4. The Respondent's action to reprimand Jackson-Ward in lieu of a one-day suspension for insubordination is not moot.

5. The Appellant has the burden of establishing that the appeal of her March 5 reassignment was timely filed.

6. The Appellant has failed to sustain that burden.

7. The appeal of her reassignment was untimely.

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

ORDER

Respondent's motion to dismiss is granted in part and denied in part.

Given under our hands and seal at the City of Madison, Wisconsin, this 15th day of July, 2008.

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

WISCONSIN DEPARTMENT OF REVENUE (JACKSON-WARD)

MEMORANDUM ACCOMPANYING ORDER GRANTING, IN PART, MOTION TO DISMISS

The Appellant asks the Commission to review three distinct personnel actions: 1) a March 30 letter of reprimand; 2) a March 30 "reprimand in lieu of a one day suspension"' and 3) a March 5 career executive reassignment. Respondent has raised various objections to Appellant's claims.[2]

I. March 30 letter of reprimand

Pursuant to Sec. 230.44(1)(c), Stats., the Commission has the authority to review various disciplinary actions imposed on State civil service employees who have permanent status in class and whose positions are not covered by a collective bargaining agreement:

> (1) APPEALABLE ACTIONS AND STEPS. . .[T]he following are actions appealable to the Commission under §230.45(1)(a):
>
> *(c) Demotion, layoff, suspension or discharge.* 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.

Reprimands are not one of the types of discipline that are specifically listed within the paragraph, which indicates that the legislature intended for reprimands to be excluded. ANAND V. DHSS, CASE NO. 81-438-PC (PERS. COMM. 1/8/1982). As a consequence, the Commission lacks subject matter jurisdiction to review the written reprimand that DOR issued to Jackson-Ward on March 30, 2007, for allegedly not recording her absences for December 26, December 27, January 3 and February 1 on the State's Payroll and Time Attendance system.[3]

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[2] In her written arguments, Jackson-Ward mischaracterized DOR's motion as a motion for summary judgment, so some of her arguments are inapplicable.

[3] Respondent mistakenly refers to the following language found in Sec. ER 46.07(1) Wis. Adm. Code, in support of its motion:

> [D]ecisions involving the following personnel transactions may not be grieved to the commission:
> (a) A written reprimand.

This paragraph, and all of ch. ER 46, Wis. Adm. Code, relates to the non-contractual grievance procedure that applies to State classified employees not covered by a collective bargaining agreement. The Commission's jurisdiction to serve as the final step in that procedure is premised on Sec. 230.45(1)(c), Stats., which is a separate jurisdictional basis from Sec. 230.44(1)(c), Stats. While Sec. ER 46.07(1), Wis. Adm. Code, makes it quite clear that the Commission may not serve as the final step arbiter for a non-contractual grievance arising from a written reprimand, that specific limitation is unrelated to the question of whether the Commission has the

II. March 30 reprimand in lieu of a suspension

A. Jurisdiction

DOR also issued Jackson-Ward a separate letter of discipline on March 30 for allegedly failing to follow a directive to inform her supervisor when she would not be reporting to work. The letter read, in part:

> On March 6th, you received a letter of reprimand for the same work rule violation. Therefore, this [March 30th] letter serves as a written reprimand in lieu of a one day suspension for this repeated violation. Continued insubordination and failure to follow instructions will result in escalating discipline, including but not limited to termination.

The parties dispute whether this discipline should be characterized as a written reprimand or a suspension. Respondent describes it, for purposes of its motion to dismiss, as a written reprimand. According to the Appellant, it is a constructive suspension "cloaked in the words of a written reprimand", and as such, the Commission has jurisdiction for reviewing it under Sec. 230.44(1)(c), Stats.

The ruling in DOC v. RODGERS, DEC. NO. 98-0094-PC (Pers. Comm. 1/27/1999), provides us with the basis for analyzing the parties' dispute as to how the disciplinary letter should be characterized. In RODGERS, the appeal related to a letter of discipline that included the following words:

> This letter shall serve as your notice of a written reprimand equal to and carrying the weight of a one day suspension under the Fair Labor Standards Act (FLSA). Although these work rule violations warrant a one day suspension, as an FLSA exempt employee, you cannot be suspended for less than a full week, (5 work days), increment.

The employer in RODGERS considered the disciplinary letter to be a one-day suspension for purposes of applying progressive discipline, and further conduct of a similar nature would be subject to discipline more severe than a one-day suspension. The RODGERS ruling concluded that the reprimand in lieu of the one-day suspension imposed against Mr. Rodgers should be deemed as a suspension for purposes of obtaining review by the Commission:

> The Commission must examine the practical effect the transaction has on the employee's employment status, in the context of the employer's intention in effecting the transaction, and the policy factors which underlie the statutory framework of the civil service, to determine whether the transaction partakes

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authority to review a direct appeal of a reprimand.

more of the nominal category of personnel transaction – e.g., a reprimand – or more of the more serious category – e.g., a suspension.

> When an employee is given a disciplinary suspension per se, there are three obvious impacts. First, the employee is relieved of the performance of his or her duties. Second, he or she loses the opportunity to earn wages during the period of the suspension. Third, the employee's disciplinary record is blemished, and this record may move the employee "up the ladder" in terms of progressive discipline in connection with any future disciplinary action.
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> In the instant case, the first and second impacts did not occur, but it is uncontroverted that appellant was subject to the third effect. . . . Respondent's obvious intention was to discipline appellant, and to do so in a manner that would be as close as possible to a one day suspension without jeopardizing appellant's exempt status under the FLSA. While the discipline imposed resulted in neither any interruption in appellant's performance of his duties nor any interruption in his salary, it constitutes not only a blemish on his disciplinary record that could negatively affect his career in general,[fn] but also a blemish that, in the case of further disciplinary action, predictably will result in an increased disciplinary penalty over what he would receive if respondent were not treating the [action] as equivalent to a one-day suspension. Thus the discipline imposed in this case had a significantly more severe disciplinary impact on appellant's employment status than would have been the case with a mere reprimand. This serves to distinguish this case from others where the Commission has focused on other effects of potential constructive suspensions. . . .
>
> [I]t should be kept in mind that if this discipline had occurred prior to the federal FLSA determination that suspensions of less than five days are inconsistent with exempt status, respondent would have proceeded with a one day suspension and would have had to establish just cause on an appeal of that transaction. Thus, a ruling in favor of the right to appeal written reprimands deemed equivalent to suspensions for [future] disciplinary purposes would only restore respondent's administrative burden to what is was prior to the aforesaid federal FLSA ruling.

[fn] For example, it could affect his future promotability.

The language used by DOR in its March 30 disciplinary letter relating to alleged insubordination is not exactly the same. Instead of saying the discipline was "equal to and carrying the weight of a one day suspension", the letter to Jackson-Ward said it was a "written reprimand in lieu of a one day suspension."[4] However, this is a distinction without substance. Respondent DOR has not argued (and there is no indication) that had Jackson-Ward been

[4] Despite the absence of an explicit statement in Jackson-Ward's letter of discipline, we are assuming the FLSA is the rationale behind the decision to not dock any of Jackson-Ward's pay.

disciplined on, for example, April 5 for insubordination, the March 30th discipline would have been given some weight other than a one-day suspension for the purpose of determining the appropriate level of progressive discipline to impose. Why else would DOR write that the discipline was "in lieu of a one day suspension"?

When viewed at the time DOR issued the March 30th letters and at the time of Jackson-Ward's April 27 letter of appeal, the Commission had subject matter jurisdiction to review the "reprimand in lieu of a one day suspension" for the same reasons relied on in the RODGERS ruling.

Respondent contends that the present appeal must be distinguished for an additional reason from the set of facts presented in RODGERS. According to Respondent, "[a]ny blemish that was on her disciplinary record vanished when she left the employment of the Department of Revenue" on May 5. Respondent suggests that the sole basis for exercise of 230.44(1)(c) authority in RODGERS was eliminated when Jackson-Ward departed DOR and took other employment with the Department of Transportation: "[S]ince each state agency is a separate employing entity, the Department of Transportation starts Complainant with a clean slate and cannot rely on Complainant's previous discipline at DOR, should discipline of Complainant become necessary there." According to Respondent, Jackson-Ward's move to DOT removed the only one of the three aspects of a suspension that served as the rationale for asserting jurisdiction in RODGERS, i.e.: "Third, the employee's disciplinary record is blemished, and this record may move the employee 'up the ladder' in terms of progressive discipline in connection with any future disciplinary action."

Even if this argument can be viewed as relating to the Commission's jurisdiction[5] rather than to the separate question of whether the dispute has become moot, the Respondent has not provided an adequate basis to establish the facts on which his argument rests. Absent an appropriate affidavit from a representative of the Department of Transportation, we are unwilling to make a finding of fact that if it were to ever contemplate disciplining Jackson-Ward, DOT would completely ignore her disciplinary record at DOR. Respondent has also not provided an affidavit to the effect that Jackson-Ward's disciplinary record at the agency in 2007 would be expunged if she were to return to employment at the Department of Revenue. Given these circumstances, the jurisdictional conclusion that was developed in RODGERS continues to apply.

B. Mootness

Respondent further contends that the appeal is moot because Jackson-Ward has left the employ of DOR. "An issue is moot when its resolution will have no practical effect on the underlying controversy." STATE EX REL. OLSON V. LITSCHER, 2000 WI APP 61, 233 WIS.2D 685, 608 N.W.2D 425. "In other words, a moot question is one which circumstances have rendered purely academic." ID.

[5] Appellant filed her appeal on April 27, two weeks prior to her resignation. We are unaware of any provision in ch. 230, Stats., or relevant administrative rules that would terminate the Commission's authority to process an appeal under Sec. 230.44(1)(c), Stats., once an appellant has left the employ of the disciplining agency. In contrast, a formal action by DOR that formally withdraws/purges the March 30 "reprimand in lieu of a one day suspension" might impact the Commission's jurisdiction.

In support of its argument, Respondent cites BURNS v. UW [UWHCA] CASE NO. 96-0038-PC-ER (PERS. COMM. 4/8/1998). Ms. Burns contended that her employer had discriminated against her in 1995 and early 1996 by failing to provide her appropriate accommodation for a hearing impairment. She resigned from her employment later in 1996. Before the claim went to hearing in 1998, the employer sought to dismiss it as moot. The key conclusion in granting the motion was that Ms. Burns' resignation precluded any effective relief:

> If complainant were to prevail here, her remedies (other than attorneys' fees and costs) would apparently be limited to an order to respondent to provide the requested accommodation and to cease and desist from discriminating or retaliating against complainant in regard to any future accommodation requests.

The key remedy that can be imposed if Ms. Jackson-Ward prevails is removing the discipline from her personnel file, so that a current or prospective employer (including, at least conceivably, DOR) cannot rely on it as a basis for not hiring her, or consider it when imposing any discipline in the future. Removal of the letter of discipline is not a hollow remedy when the letter would otherwise still have some vitality.

Respondent DOR also cites the decision in WONGKIT v. UW-MADISON, CASE NO. 97-0026-PC-ER (PERS. COMM. 10/21/1998). The WONGKIT decision applied the Wisconsin Fair Employment Act, rather than the State civil service provisions found in ch. 230, Stats. Ms. Wongkit identified twelve separate workplace incidents that she claimed constituted discrimination because of her race, national origin and/or race. Most of the allegations related to specific comments supposedly made to her by her supervisor over a 12-month period. However, one allegation was that her office hours were arbitrarily changed and another allegation related to a letter of reprimand. The legal theory in WONGKIT is quite different than the theory that underlies the present appeal. Ms. Wongkit had the burden of persuasion regarding her allegations of discrimination, while DOR has the burden of persuasion relating to an appeal of a disciplinary action under Sec. 230.44(1)(c), Stats. The majority of Wongkit's allegations related to specific comments by her former supervisor, rather than to the imposition of discipline.

Respondent's motion to dismiss the appeal as moot must be denied.

III. Career executive reassignment

While only the two March 30 disciplinary letters were initially identified as the subject of her April 27 appeal, Appellant has more recently sought to obtain review of Respondent's decision to reassign Jackson-Ward from one career executive position to another, effective March 5, 2007. Appellant contends that this action was a demotion (more specifically a constructive demotion) and is within the Commission's authority to review. Respondent argues that the additional claim is untimely.

A demotion is one of the disciplinary actions listed in Sec. 230.44(1)(c), Stats., and is reviewable by the Commission where the employee contends there was no just cause for the imposition of the discipline. The Commission has construed the paragraph to encompass a "constructive demotion," the elements of which were summarized in DFI (GAWENDA), DEC. NO. 32401 (WERC, 4/2008):

> A constructive demotion occurs when an employee with permanent status in class is permanently assigned a different set of duties that are best described by a class in a lower pay range *and* where the agency is motivated in doing so by an intent to discipline the employee. DNR (GRUENTZEL I AND II), DEC. NO. 32352 (WERC, 2/08), citing DHFS & DMRS (WARREN), DEC. NO. 31215-A (WERC, 12/05). "Part of the constructive demotion analysis is to determine the proper civil service classification of the employee's new collection of duties in order to compare it to the class level assigned to the employee's former position." GRUENTZEL, ID.

The term "demotion" does not have the same meaning for positions within the career executive program as it does for positions outside of that program. According to Sec. ER 1.02(8), Wis. Adm. Code:[6]

> "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 . . . .

This is the definition that the Commission has applied to the term as it is used in Sec. 230.44(1)(c), Stats.

Separate rules apply to career executive employees. Those rules are found in ch. ER-MRS 30, Wis. Adm. Code, and have been promulgated by the Division of Merit Recruitment and Selection, Office of State Employment Relations, pursuant to Sec. 230.24, Stats. The relevant provisions are:

> ER-MRS 30.07
> (1) Career executive reassignment means the permanent appointment by the appointing authority of a career executive within the agency to a different career executive position at the same *or lower* classification level for which the employee is qualified to perform the work after being given the customary orientation provided to newly hired workers in such positions.

[6] An identical definition is found in Sec. ER-MRS 1.02(5), Wis. Adm. Code.

> (2) When an appointing authority determines that the agency's program goals can best be accomplished by reassigning an employee in a career executive position within the agency to another career executive position in the same or lower classification level for which the employee is qualified, the appointing authority may make such reassignment, provided it is reasonable and proper. All such reassignments shall be made in writing to the affected employee, with the reasons stated therein.
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> ER-MRS 30.10
> (2) Career executive reassignment by the appointing authority, as defined under s. ER-MRS 30.07(1) and referred to in sub. (1), is authorized without limitation. However, an employee with permanent status in the career executive program *may appeal the reassignment* to the Wisconsin Employment Relations Commission *if it is alleged that such reassignment either constitutes an unreasonable and improper exercise of an appointing authority's discretion or is prohibited by s. 230.18, Stats.*
> (3) Removal of an employee with permanent status in the career executive program from the career executive program which results in the *placement of the employee in a position allocated to a classification assigned to a lower non-career executive pay range is defined as a demotion*, and may be appealed. (Emphasis added.)

For career executives, only an assignment to a lower non-career executive pay range, i.e. removal from the program, constitutes a demotion. See DOA & OSER (SUTHEIMER), DEC. NO. 30932-A (WERC, 6/2004). Such an action is reviewable by the Commission as provided in Sec. ER-MRS 30.10(3), Wis. Adm. Code. Assignment of a career executive to a position that is in a lower classification but is still a career executive position is defined as a "reassignment" rather than a demotion, and career executive reassignments may only be reviewed by the Commission where there is an allegation that the action was taken because of the employee's political or religious opinions (or other protected basis listed in Sec. 230.18, Stats.), or that the action was "an unreasonable and improper exercise of . . . discretion."

Jackson-Ward contends that the Commission has the authority to hear her "constructive demotion" claim under Sec. 230.44(1)(c), Stats., as well as under both Sec. ER-MRS 30.10(2) and (3), Wis. Adm. Code. The time limit for filing an appeal under Sec. 230.44(1), Stats., is established in Sec. 230.44(3), Stats. It provides as follows:

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

However, the specific definitions found in ch. ER-MRS 30, Wis. Adm. Code, serve to prevent Jackson-Ward from using Sec. 230.44(1)(c), Stats., to pursue a *direct* appeal of the action, and require us to instead exercise the limited jurisdiction that is conferred by paragraphs (2) and (3) of Sec. ER-MRS 30.10, Wis. Adm. Code.

As already noted, the Respondent has raised a timeliness objection to this aspect of the appeal. There is no explicit statement in the rules to the effect that an appeal to the Commission under Sec. ER-MRS 30.10, Wis. Adm. Code, must be filed within 30 days of either the effective date or the date of notification, whichever is later. However, the rules make other, more general references to Sec. 230.44, Stats., indicating that the Commission should apply the same time limit found in Sec. 230.44(3), Stats., to appeals arising under Sec. ER-MRS 30.10(2) and (3), Wis. Adm. Code. Pursuant to Sec. ER-MRS 30.10, Wis. Adm. Code:

> (4) Permanent status in the career executive program grants an employee the same redress rights granted employees with permanent status in class under s. 230.44, Stats., except as provided in sub. (1).
> (5) An employee in a career executive position serving a trial period shall have the same right of appeal under s. 230.44, Stats., as an employee who does not have permanent status in class in his or her present position.

Jackson-Ward also admits that a 30-day time limit, i.e. the time constraint in Sec. 230.44(3), Stats., applies to her appeal of the March 5 assignment action. In addition, the Commission is unaware of any basis for concluding that some other time limit is to be applied to an appeal filed pursuant to Sec. ER-MRS 30.10, Wis. Adm. Code. These circumstances require that we analyze whether Jackson-Ward's appeal of the March 5 assignment was filed within 30 days of either the effective date or the date of notification, whichever is later.[7]

To the extent Jackson-Ward is asking the Commission to review the March 5 assignment pursuant to Sec. ER-MRS 30.10(2), Wis. Adm. Code, as an appeal of a reassignment to another career executive position, her April 27 filing was clearly more than 30 days after she received actual notice of that reassignment. The subsequent receipt of information causing the appellant to believe that the underlying decision was improper has no effect on the limited period for commencing an appeal. DATCP (ELMER), DEC. NO. 32087 (WERC, 5/2007); DOC (RASMUSSEN), DEC. NO. 31121 (WERC, 10/2004). Jackson-Ward was notified by letter that she was being assigned on March 5 to a lower level career executive position. She had 30 days from that date to file a timely appeal under Sec. ER-MRS 30.10(2), Wis. Adm. Code, but failed to do so. Therefore, her claim under that provision must be dismissed.

Jackson-Ward also claims that the assignment was to a position *outside* of the career executive program, so that it constituted a "demotion" within the meaning of Sec. ER-MRS 30.10(3), Wis. Adm. Code. In constructive demotion cases, the employee is often contending

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[7] The parties appear to skip over the question of whether the Appellant should, pursuant to Sec. PC 3.03(2), Wis. Adm. Code, be permitted to amend her April 27 appeal to encompass a claim related to her March 5 reassignment and have the claim relate back to the original filing date. For the purpose of the analysis set out below, we treat those questions as having been answered in Appellant's favor.

that the responsibilities assigned to the position gradually eroded so that the proper classification slips into a lower class, even though the position remains officially denominated at the higher class level. As noted in DAVIS V. ECB, CASE NO. 91-0214-PC (PERS. COMM. 6/12/1992), the employee is "required to establish at the appeal hearing that the new position, although nominally at the same class level as the prior position, in fact is misclassified." Given the definition of "demotion" that applies to an appeal under Sec. PC-ER 30.10(3), Wis. Adm. Code, Jackson-Ward would have to show that the new assignment is misclassified as a Human Resources Program Officer (assigned to pay range 81-02 and within the career executive program) and that the new collection of permanently assigned duties were more accurately described in a classification that is outside of the career executive program.

The April 27 appeal was obviously received by the Commission more than 30 days after March 5. Jackson-Ward argues that her claim should be considered timely nevertheless, because the precise scope of her new duties as Assistant Director and the rationale for the assignment were unclear at the time the reassignment took effect:

> [T]he reassignment of [Appellant] was a constructive demotion and part of a calculated and systematically abusive scheme that was suddenly thrust upon [Appellant] in March 2007. The letter to [Appellant] that ordered the reassignment does not describe the duties of the new assignment nor does it effectively provide the [Appellant] with a reasonable expectation of her new responsibilities. It does not include a new job description. It was only through the painful experiences in March that [Appellant] was fully able to ascertain what the reassignment really meant in terms of her duties, and why it had been ordered. It was a disciplinary act, pure and simple. It was part of a continuous effort to intimidate her.
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> A demotion is usually considered a distinct act for the determination of whether time limits on filing an appeal have been met. However, a constructive demotion must be held to a different standard. To date, Respondent continues to maintain that its actions in reassigning [Appellant] did not constitute a demotion. It was only through [Appellant's] experience working in the position [that] the elements of a constructive demotion reveal themselves. Until this point, [Appellant] was unable to assess whether this was: 1) a lawful reassignment of a career executive, 2) a constructive demotion issued that was an unreasonable and improper exercise of agency discretion, or 3) an actual *de jure* demotion as it removed [Appellant] from the ranks of career executives.
>
> At the pre-disciplinary meeting held on March 15, [Appellant] still clung to a wisp of hope that Mack [who drafted the letter that reassigned Jackson-Ward] would resolve any concerns [Appellant] may have had in an honest and even-handed fashion. Until the elements of a constructive demotion were fully met via actual work experience, [Appellant] had no means of reasonably

determining that a constructive demotion had actually occurred. In DAVIS V.

> EDUCATIONAL COMMUNICATIONS BOARD, CASE NO. 91-0214-PC, (PERS. COMM., 6/21/94), the facts are nearly identical. The [Personnel Commission] recognized, that as with the [Appellant], in the usual constructive demotion case, there would probably not be a written notice to the employee that specifically describes the exact reduction in duties. Therefore, any time limits cannot commence until the employee is aware that the reassignment constituted a constructive demotion. DAVIS *supra*, at 4-5. In DAVIS, the employee eventually received a specific written description of the changes in duties. ID. The [Appellant] did not. For the [Appellant], awareness slowly came during the month of March and was conclusively achieved on March 30, 2007, from the tone and content of the [two] documents [imposing discipline].
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> It was not until March 30, 2007, that the full impact of the reassignment could be understood for what it was – a constructive demotion motivated by the punitive intent of Mack. Until [Appellant] actually worked in the job, the full impact of the changes in duties, and responsibilities was yet to be fully realized and identified. Therefore, as the [Appeal] was filed within 30 days of March 30, 2007, the appeal of the reassignment/constructive demotion was timely filed.

Ms. Davis' position underwent various changes between 1985 and 1990 without a formal change to her classification level. Then in June 1991, her supervisor circulated a copy of a new job description for her, which was to be effective on October 1, 1991, even though it accurately described Davis' duties beginning in May. Ms. Davis filed her appeal on October 28, 1991. It was considered timely because it was received within 30 days of the effective date of the first written notice of the changes to her position. The Commission relied on Sec. 230.09(2)(c), Stats., which provides, in part: "In all cases, appointing authorities shall give written notice to the . . . employee of changes in the assignment of duties or responsibilities to a position when the changes in assignment may affect the classification of the position."

Respondent DOR provided written notice to Jackson-Ward that her responsibilities were being substantially changed effective March 5. The letter notified Jackson-Ward that the change was sufficient to alter her classification level, but, according to Appellant, did not provide a description of the duties that would have allowed her to determine whether they would still be appropriately identified within a career executive classification. She contends that she received the more specific information over the course of the next several weeks so that she was able to conclude by March 30 that her new duties constituted a (constructive) demotion outside of the career executive program. In its reply brief, Respondent DOR pointed out that there was inadequate support for Jackson-Ward's assertion: "[Appellant] was never removed from career executive status by the Department of Revenue. [Appellant's] statements in her brief to that effect are false and not supported by the record in any way."

Appellant has the burden of establishing that her appeal was timely filed. UW & OSER (KLINE), DEC. NO. 30818 (WERC, 3/04). Jackson-Ward has not identified a class level outside the career executive program that she feels better describes her permanently assigned duties between March 5 and her May 5 resignation, nor has she supplied any description of the duties that she believes would support such a classification. Her only specific contention is that it was not until she received the disciplinary actions on March 30 that she understood "the full impact of the reassignment." She had been notified in writing that beginning on March 5, she was no longer the Respondent's Human Resources Director and would begin performing the responsibilities of an Assistant Human Resource Services Director. The letter also indicated that while there was no actual change to her rate of pay, the reassignment moved her from pay range 81-01 into a lower pay range (81-02). Appellant also admits that her work location was changed immediately from an office to a cubicle and that she lost supervisory responsibility for all 10 of her former subordinates. It makes no sense that two March 30 letters of discipline would inform Jackson-Ward of the specific nature of a wholesale change in her duties that had occurred on March 5. The March 30 letters are in the case file and relate to Jackson-Ward's leave reporting practices rather than somehow informing her of the duties she had been assigned beginning March 5. We conclude that Apellant has not sustained her burden of showing her claim of constructive demotion to a position classified outside the career executive program was timely filed.

Appellant's April 27 appeal was untimely relative to the reassignment action, as to claims under both Sec. ER-MRS 30.10(2) and (3), Wis. Adm. Code.

A member of the Commission's staff will contact the parties for the purpose of convening another prehearing conference relating to the Appellant's sole remaining claim arising from the March 30 reprimand in lieu of a one-day suspension.

Dated at Madison, Wisconsin, this 15th day of July, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

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