STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JOELL SCHIGUR, Appellant,

v.

Attorney General, WISCONSIN DEPARTMENT OF JUSTICE, Respondent.

Case 3
No. 68096
PA(adv)-142

Decision No. 32627

Appearances:

Peter J. Fox, Attorney, Fox & Fox, S.C., 124 West Broadway, Monona, WI 53716, appearing on behalf of Ms. Schigur.

John R. Sweeney, Assistant Attorney General, P.O. Box 7857, Madison, WI 53707-7857, appearing on behalf of the Department of Justice.

ORDER DEFERRING MOTION TO DISMISS

This matter is before the Wisconsin Employment Relations Commission (the Commission) on Respondent Department of Justice's motion to dismiss for lack of subject matter jurisdiction. After the briefing schedule had been completed, the Commission raised several additional questions so that the final submissions from the parties were received on or about December 2, 2008.

Having reviewed the record, being fully advised in the premises, and based on the limited information that has been submitted, the Commission makes and issues the following

FINDINGS OF FACT

1. At all relevant times, Joell Schigur, the Appellant in this matter, has been employed by the Division of Criminal Investigation (DCI), Wisconsin Department of Justice (the Respondent).

2. Effective May 28, 2006, she was promoted from her permanent civil service position of Special Agent In-Charge to a Career Executive position in DCI's Public Integrity Bureau with the title of Criminal Investigation Director. It was her initial appointment to the Career Executive program. According to the appointment letter, she was required to "serve a two-year continuous trial period prior to attaining permanent status" in her new position.

3. It is Respondent's practice to notify an employee of his or her probationary status in writing, including initial placement on probation, extensions of probation, failure to complete probation, early termination of probation, and satisfactory completion of probation.

4. It is Respondent's practice for a supervisor to supply the employee with a copy of any performance evaluation of that employee, as well as to send a copy to the agency's personnel office.

5. At the time of the Appellant's promotion, Jim Warren was the DCI Administrator. He vacated the position sometime after November 9, 2007 and on January 2, 2008, Mike Myszewski carried out the responsibilities of the DCI Administrator position on an "acting" basis. Effective March 9, 2008, Mr. Myszewski was hired to fill the Administrator position on a permanent basis.

6. Between the May 2006 promotion and November 2007, Appellant received uniformly positive performance evaluations from her supervisor, Jim Warren, for her work in the Criminal Investigation Director position.

7. Mike Myszewski, serving as the acting DCI Administrator, prepared Appellant's 21-month performance evaluation. The evaluation, which covered the period from November 27, 2007 until February 15, 2008, was positive and included the following sentence in the "overall performance" section: "I recommend that Joell be removed from probation and receive permanent status as a director."

8. Mr. Myszewski also drafted a memorandum, bearing the date of February 15, 2008, to Gary Martinelli, the Director of Respondent's Bureau of Human Resources. In the memorandum, Myszewski noted, inter alia, that Appellant "had mastered all of the key job areas of a bureau director, and keeping her on probation for three more months is not necessary." The memorandum requested termination of the remainder of Appellant's trial period so that she would attain permanent status in the position and in the Career Executive program: ". . . I am recommending that Joell Schigur be removed from probation and confirmed in her position as bureau director." The memorandum included a line for Myszewski's signature as Acting Administrator.

9. Mr. Myszewski did not forward the memorandum to Mr. Martinelli.

10. Mr. Myszewski communicated the results of his evaluation to Ms. Schigur on or about February 22, 2008 and, at the same time, showed her a copy of the draft memorandum he had prepared for Mr. Martinelli. Myszewski also informed Appellant that Ray Taffora, Deputy Attorney General, had already approved the request for ending her trial period. Nevertheless, Mr. Taffora never notified Appellant in writing that the remainder of her trial period had been waived.

11. The Appellant does not accept Respondent's assertion that the Administrator of the Division of Merit Recruitment and Selection (DMRS) in the Office of State Employment Relations, had no notice of DOJ's desire to waive the remainder of Appellant's trial period and further contends that DOJ's past practice has been for the agency to unilaterally accomplish an early completion of an employee's probation/trial period and that DMRS has not been involved in that process at all.

12. On May 21, 2008, Mr. Myszewski completed another written performance evaluation of Appellant. In contrast to the previous evaluations, he summarized her overall performance as follows:

> On 2/22/08, I recommended that Joell be removed from probation and that she receive permanent status as a director. *I can no longer make that recommendation based on her actions since that time*. . . .
>
> Therefore, I am terminating the probation of Joell Schigur. [Emphasis added.]

13. By letter dated May 21, 2008, Gary Martinelli notified Appellant, in part, as follows:

> Administrator Michael Myszewski has informed you that he is terminating this probationary period and returning you to your prior position as a Special Agent In-Charge.
>
> The decision to terminate this probationary period was based on an assessment that you are not meeting the standards expected of a Criminal Investigation Director/Career Executive manager. . . .
>
> [T]his letter is to formally notify you of your "noncompletion" of the required probationary period as a Criminal Investigation Director and your restoration to the position of Special Agent In-Charge for the DCI, Madison Regional Office effective May 22, 2008.

14. Ms. Schigur filed an appeal with the Commission on June 19, 2008 in which she made the following request for relief:

> 1. Declaration that she had reached permanent status as a DCI Public Integrity Director as of February 22, 2008;
> 2. Removal of her May 21, 2008 evaluation from her personnel file along with any reference to her not passing probation;
> 3. Immediate instatement into her previous DCI Public Integrity Director position as a permanent status employee;

4. Compensation for any loss of pay and/or benefits resulting from her demotion;
5. Compensation for her costs and attorney fees in bringing this action.

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 Commission has subject matter jurisdiction over this matter.

2. Based on the uncontested facts, the Appellant has not satisfied her burden as to Sec. 230.44(1)(a) or (d), Stats., or Sec. ER 46.03, Wis. Adm. Code.

3. The Appellant has requested an evidentiary hearing to establish facts supporting her view that the Commission has subject matter jurisdiction under Sec. 230.44(1)(c), Stats. Facts necessary to a conclusion on this question are not uncontested at this point in time.

3. The Commission grants the request for an evidentiary hearing.

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

ORDER

A final ruling on Respondent's motion to dismiss is deferred until an evidentiary hearing can be held.

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

Department of Justice (Schigur)

MEMORANDUM ACCOMPANYING ORDER DEFERRING MOTION TO DISMISS

This dispute relates to the Commission's statutory authority to review certain personnel actions taken with respect to positions within the State's civil service, as provided in Sec. 230.44 and .45, Stats. The Respondent has raised a jurisdictional objection to the instant appeal, contending that it arises from a personnel transaction that falls outside the scope of either of these two statutory sections. The Appellant has the burden of establishing subject matter jurisdiction. ALLEN V. DHSS & DMRS, CASE NO. 87-0148-PC (PERS. COMM. 8/10/1988); LAWRY V. DP, CASE NO. 79-26-PC (PERS. COMM. 7/31/1979).

I. Section 230.44(1)(c), Stats.

The primary jurisdictional basis being advanced by the Appellant is Sec. 230.44(1)(c), Stats., which provides:

> If an employee has *permanent status in cla*ss . . . 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. (Emphasis added.)[1]

Closely related language is found in Sec. 230.34(1), Stats.:

> (a) An employee with *permanent status in class* . . . may be removed, suspended without pay, discharged, reduced in base pay or demoted only for just cause. . . . (Emphasis added.)

"Permanent status in class" is defined in Sec. ER 1.02(29) and in Sec. ER-MRS 1.02(23), Wis. Adm. Code, as "the rights and privileges attained upon successful completion of a probationary period required upon an appointment to permanent, seasonal or sessional employment."

Sometime prior to May of 2006, Joell Schigur, the Appellant, had attained permanent status in class with the Department of Justice as a Special Agent In-Charge. Then, effective May 28, 2006, she was promoted to a position in the Career Executive program and was required to serve a two-year "trial period" in the higher-level position. In an action effective May 22, 2008, Respondent putatively removed the Appellant from the Career Executive position as Criminal Investigation Director, and returned her to her former Special Agent In-Charge position. Appellant contends that earlier, in February 2008, she had attained

[1] This provision does not encompass employees in a collective bargaining unit where a collective bargaining agreement is in effect. Sec. 230.34(1)(ar), Stats. The appeal procedure for those individuals is governed by the terms of the bargaining agreement.

permanent status in the Criminal Investigation Director position so that the subsequent May transaction has to be viewed as a demotion to a position outside of the Career Executive program and to a lower pay range. Appellant also appears to contend that even if her trial period was not waived in February, Respondent failed to take certain steps necessary to end her career executive employment in May. Under these circumstances, Appellant contends, the May transaction is reviewable under Sec. 230.44(1)(c), Stats., as a demotion. Respondent makes the contrary assertions that Appellant had not completed the trial period required for permanent status in the Career Executive position before the May 22, 2008 action was effectuated and that it properly returned her to the Special Agent In-Charge position before she attained permanent status in the career executive program.

The Career Executive program is governed by administrative rules that have been adopted by the Administrator of the Division of Merit Recruitment and Selection (DMRS) pursuant to the authority found in Sec. 230.24(1), Stats.:

> To accomplish the purpose of this program, the administrator [of DMRS] may provide policies and standards for . . . probation . . . separate from procedures established for other employment.

Among the rules that have been adopted by DMRS relating to the Career Executive program is Sec. ER-MRS 30.06, Wis. Adm. Code:

> Upon initial appointment to the career executive program, a career executive employee, prior to attaining permanent status, shall serve a 2 year continuous service trial period. However, one year, or any portion thereof, *may be waived by the appointing authority* at any time after a one year continuous service trial period has been served *after both the employee and the administrator have been notified in writing*. . . . Upon successful completion of the trial period, a career executive employee attains permanent status. . . . (Emphasis added.)

The rule's reference to "the administrator" is, likewise, to the Administrator of DMRS.[2]

According to the rule, the waiver period may not exceed one year of what is otherwise a two-year long trial period. There is no dispute that for Ms. Schigur, the three months between February and May of the same year would satisfy this provision. The rule also references some form of a written notification to both the employee and the Administrator of DMRS. The notification would have to describe a decision to waive that would take effect

[2] Section ER-MRS 1.02 (intro), Wis. Adm. Code, and Sec. 230.03(1), Stats.

once the notice requirement had been satisfied.[3] Even though the rule refers to a written notice, it does not specify who must issue the notice. Once notice has been provided, the waiver takes effect. While we assume that the appointing authority will typically memorialize the waiver decision in writing, the rules do not on their face preclude an oral statement.

The Appellant asserts that she achieved permanent status in February 2008 because Respondent waived the remainder of her trial period. If Appellant attained permanent status in the Criminal Investigation Director position, DOJ's subsequent action would be a demotion, would be reviewable pursuant to Sec. 230.44(1)(c), Stats., and could only be upheld upon a finding of just cause. More specifically, Appellant contends that the waiver was accomplished by the written performance evaluation that her supervisor, Mr. Myszewski, prepared, signed and distributed on or about February 25, 2008. In that evaluation, Mr. Myszewski wrote, in part:

> Joell has successfully mastered all of the objectives and standards for a bureau director. I recommend that Joell be removed from probation and receive permanent status as a director.

Respondent DOJ argues that the February evaluation was not a waiver of the two-year trial period as required by Sec. ER-MRS 30.06, Wis. Adm. Code. Respondent takes the position that the supposed waiver was neither preceded by the requisite written notice nor granted by the appointing authority.

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[3] The rule clearly describes a two-step process, with waiver being granted by the appointing authority. The provision must be parsed as follows: "[O]ne year, or any portion thereof, may be waived . . . *after* both the employee and the administrator have been notified in writing." It would make no sense if the written notice to the administrator and employee was of the appointing authority's action (waiver) that had already taken effect. There is a related provision for supervisory and managerial employees whose positions are outside the career executive program. Pursuant to Sec. ER-MRS 13.02(5), Wis. Adm. Code:

> In the case of initial original or promotional appointments to positions designated as supervisory or managerial as defined under s. 111.81, Stats., all probationary periods shall be for one year duration unless the last 6 months or a portion thereof is waived by the administrator at the request of the appointing authority.

This provision also requires a two-step process, although the waiver decision is by the administrator, rather than the appointing authority. In contrast, the appointing authority, alone, decides whether probationary periods for employees who have been transferred, reinstated or voluntarily demoted are necessary or are to be shortened. Pursuant to Sec. ER-MRS 13.04, Wis. Adm. Code:

> (2) The appointing authority shall make a determination as to whether the appointee shall serve a permissive probationary period and shall so notify that employee in the letter of appointment.
> (3) The appointing authority may waive these permissive probationary periods at any time. The employee shall be notified by the appointing authority of the determination to waive such employee's probationary period.

A. Granted by the appointing authority

For purposes relating to the present case, an "appointing authority" is defined in Sec. 230.03(4), Stats., as "the chief administrative officer of an agency unless another person is authorized to appoint subordinate staff in the agency by the constitution or statutes."[4] The Attorney General is the chief administrative officer of the Department of Justice and is granted the power to "delegate in writing part or all of his or her power of appointment, including discipline and removal." Sec. 230.06(2), Stats. According to affidavits supporting Respondent's motion to dismiss, the Attorney General had, by February 2008, delegated the authority to appoint and remove individuals from positions in the agency to the Deputy Attorney General and to the Administrator of DOJ's Division of Management Services, but not to anyone else. Even if the Appellant's February 2008 evaluation from Mr. Myszewski could be considered something more than merely a recommendation to waive the remainder of Appellant's two-year trial period, it was not issued by "the appointing authority." As a consequence, Myszewski's February written evaluation of Schigur does not satisfy Sec. ER-MRS 30.06, Wis. Adm. Code., as a career executive trial period waiver by the appointing authority.[5]

Even though Appellant's reliance on the evaluation to serve as a waiver is unavailing, Deputy Attorney General Taffora purportedly "approved" the waiver request in February. According to the facts as set forth in the Appellant's written argument, Mr. Myszewski mentioned Mr. Taffora's approval during his conversation with Ms. Schigur on or about February 22. Respondent has not indicated its disagreement on this point and the Commission has no reason to believe Myszewski's comment to be untrue. We assume that Taffora's approval was verbal rather than in writing, but the rule does not explicitly require written approval by the appointing authority. At this very early stage of the proceeding, we decline to grant Respondent's motion that is premised on an absence of approval attributable to the appointing authority. If DOJ takes the position that Taffora did not approve the waiver within the meaning of the rule, Respondent may reassert its motion and the topic can be another subject of the evidentiary hearing referenced below.

B. Notice to DMRS

Respondent also argues that DOJ could not have waived the final three months of Appellant's career executive trial period because the Administrator of DMRS was never notified of DOJ's intent to waive it. Both parties attached documents to their submissions and the authenticity of the documents has not been drawn into question. The Respondent has

[4] The statutory definition is made applicable to the administrative rules of DMRS by Sec. ER-MRS 1.02 (intro.), Wis. Adm. Code.

[5] Even though the evaluation was not a waiver, it provided written notice to the Appellant of an intent or desire to waive the remainder of her trial period: "I am recommending that Joell Schigur be removed from probation and confirmed in her position as bureau director." The document satisfied that aspect of the waiver process described in the administrative rule.

submitted several affidavits prepared by Gary Martinelli, Director of Human Resource Services, stating that no notice was actually provided to the Administrator of DMRS. The Appellant rejects Mr. Martinelli's statement and believes "an evidentiary hearing is absolutely necessary and critical to testing the credibility of the contention." The Appellant also appears to take the position that written notice to DMRS is not necessary in order to effectuate a valid waiver of the trial period.[6]

Given these circumstances, the Commission will defer ruling on that portion of Respondent's motion to dismiss Appellant's claim under Sec. 230.44(1)(c), Stats., until a hearing can be held to present evidence relating to whether the Respondent had waived the remainder of Appellant's career executive trial period in February 2008.[7]

C. Adequacy of May action

Appellant also appears to be advancing the theory that the Respondent failed to take one or more steps necessary to effectuate a legal termination of Appellant's trial period in May 2008 and, as a consequence, she gained permanent status in class in the career executive program at that time. She observes that "the demotion of a probationary employee back to her previous permanent position[] – *unlike* an appointment from probationary to permanent status – requires not just notice to the affected parties but also a formal "approval'" (emphasis in original) and cites Sec. ER-MRS 16.02, Wis. Adm. Code:

> All reinstatements and restorations shall be reported to the administrator for approval *as may be required*. (Emphasis added.)

Respondent argues that the phrase "as may be required" is limited to those reinstatements and restorations for which there is an express requirement elsewhere in the statutes or rules for obtaining DMRS approval.[8] We agree that Sec. ER-MRS 16.02, Wis. Adm. Code, must be read to merely refer to *other* reporting requirements, and not to establish a separate reporting requirement for all reinstatements and restorations. To conclude otherwise would make the

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[6] "To suggest that Ms. Schigur could not have been made permanent because DMRS was not notified therefore, is contrary to DCI's past practices. We do not have unfettered access to DCI and DOJ employees, as the Respondent does, and therefore, are not presently positioned to provide the Commission with affidavits from current and past employees." Appellant's submission dated December 2, 2008.

[7] Witnesses from DMRS may be able to establish what the statewide practice is regarding notice and the waiver of a portion of an employee's career executive trial period.

[8] For example, Sec. ER-MRS 13.08(2), Wis. Adm. Code, requires that when a probationary employee is dismissed and is notified by the appointing authority that he or she may be restored to the register from which the appointment was made, upon request to and with the approval of DMRS, a copy of the notice must be sent to DMRS.

last four words of the rule mere surplusage.[9]

II. Other jurisdictional theories

Appellant's other jurisdictional theories in this matter are unpersuasive. She contends that the Commission also has jurisdiction pursuant to the following paragraphs in Sec. 230.44(1), Stats.:

> [T]he following are actions appealable to the commission under s. 230.45(1)(a):
> (a) Appeal of a personnel decision under this subchapter made by the administrator or by an appointing authority under authority delegated by the administrator under s. 230.05(2). . . .
> (d) A personnel action after certification which is related to the hiring process in the classified service and which is alleged to be illegal or an abuse of discretion may be appealed to the commission.

Contrary to Appellant's assertion, the personnel decision in question is not attributable to the Administrator of DMRS. The power to "appoint persons to or remove persons from the classified service" is a power granted to appointing authorities by Sec. 230.06(1)(b), Stats., rather than to the DMRS Administrator, so Sec. 230.44(1)(a), Stats., does not apply to the present appeal.

The decision to end someone's Career Executive trial period is also not "related to the *hiring* process" so as to fall within the scope of Sec. 230.44(1)(d), Stats. In a slightly different context, this argument was addressed in BOARD OF REGENTS V. WIS. PERS. COMM., 103 WIS.2D 545, 558-59, 309 N.W.2D 366 (CT. APP. 1981):

> 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 . . . .
>
> We view discharge of a probationary employee as the process by which an employment contract is terminated, not as a process by which the employee is not hired. The hiring process cannot be reasonably construed to embrace the acquisition of permanent status in class. . . . We believe it unreasonable to conclude that an employee has not been hired until he has successfully completed a six-month (sec. 230.28(1)(a), Stats.), one-year (sec. 230.28(1)(am)), eighteen-month (sec. 230.28(5)), two-year (sec. 230.28(1)(b)), or three-year (sec. 230.38(1)(b) and (5)) probationary period. [All references are to the 1981 statutes.]

Finally, the Appellant asserts that Sec. ER 46.03, Wis. Adm. Code., "unambiguously allows" the Commission to review "removal" decisions, whether or not the employee had

[9] Courts construe a statute so that no part of it is surplusage, giving effect to all the words that are used. RANDY A.J. V. NORMA I.J., 2004 WI 41, 270 WIS. 2D 384, 677 N.W.2D 230.

permanent status in the class from which s/he was removed. The referenced rule is part of the procedure adopted by the Director of the Office of State Employment Relations pursuant to the authority granted by Sec. 230.04(14), Stats., to "establish, by rule, the scope and minimum requirements of a state employee grievance procedure relating to conditions of

employment."[10] There are two subsections in Sec. ER 46.03, Wis. Adm. Code.: the first provides a general description of what issues may be grieved and the second identifies actions that may *not* be grieved. The second subsection includes the following:

> (2) An employee may not use this chapter to grieve:
>
> (c) A demotion, suspension, discharge, removal, layoff or reduction in base pay;

The rule establishes that "removal" actions taken with respect to certain state employees are outside the scope of the grievance procedure for those employees. The rule makes no attempt to modify Sec. 230.44(1)(c), Stats., which grants State employees the right to appeal "a demotion, layoff, suspension, discharge or reduction in base pay" to the Commission. Whether or not the Respondent's May 22, 2008 personnel action was a "removal" and was not grievable, the relevant question in today's ruling is whether the Appellant had permanent status in class so as to fall within the scope of Sec. 230.44(1)(c), Stats.

A representative of the Commission will contact the parties for the purpose of scheduling a prehearing conference prior to an evidentiary hearing relating to Appellant's assertion that DOJ waived the final months of Appellant's trial period.

Dated at Madison, Wisconsin, this 16th day of December, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

[10] Chapter ER 46 describes the grievance procedure for those employees who are not covered by a collective bargaining agreement and are not filling a limited term position.

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Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner