

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

SCOT GALLIGAN, Appellant,

vs.

Secretary, WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case 96
No. 68571
PA(adv)-155

Decision No. 32987-B

Appearances:

Timothy M. Scheffler, Attorney, Stix Law Offices, 700 Rayovac Drive, Suite 117, Madison, WI 53711, appearing on behalf of Appellant.

Jonathan Nitti, Attorney, Office of Legal Counsel, Department of Corrections, P.O. Box 7925, Madison, WI 53707-7925, appearing on behalf of the Department of Corrections.

DECISION AND ORDER

This matter is before the Wisconsin Employment Relations Commission as an appeal from what is alleged to be a constructive demotion. The Commission previously granted a motion to dismiss the Appellant's claim under Sec. 230.44(1)(a), Stats., but denied a motion for summary judgment on Appellant's constructive demotion claim. DOC (GALLIGAN), DEC. NO. 32987 (WERC, 2/2010). The parties stipulated to the following statement of the issues for hearing:

1. Whether the Appellant's collection of duties in his Vacation/Holiday/Transportation Relief position at Dodge [Correctional Institution] or later in his 3rd shift supervisory position at Dodge C.I. were at a lower classification level than his previous duties in a Supervis[ing] Officer 2 position at Kettle Moraine C.I.? Subissue: Were the Vacation/Holiday/Transportation Relief assignment and its attendant collection of duties temporary or permanent for the purposes of Appellant's assertion of constructive demotion?
2. Whether Respondent intended to discipline/demote the Appellant?

No. 32987-B

A hearing was conducted on June 29 and 30, 2010 before Kurt M. Stege, a member of the Commission's staff serving as the designated Hearing Examiner. The parties filed post-hearing briefs, the last of which was received on October 21, 2010. The examiner issued a proposed decision on February 11, 2011, concluding that the Appellant's move to Dodge and his work assignments there had been "based upon operational considerations rather than on any intent to punish or discipline the Appellant." The proposed decision would have dismissed the appeal but only addressed the second of the two hearing issues. Appellant filed objections on March 14, 2011 and Respondent filed a response on March 23, 2011.

For the reasons explained below, the Commission dismisses the appeal but concludes that the Appellant has failed to show that his permanently assigned duties at Dodge were more properly classified at a level below that of Supervising Officer 2 (Captain). Therefore the Commission only addresses the first of the two hearing issues. The Commission has deleted the two Findings of Fact in the proposed decision (Findings 16 and 27) relating to the issue of intent, has added Findings 24, 25, 26, the indented portion of Finding 2, and all except the first sentence of Finding 17, has modified Conclusion of Law 4, and has replaced all of the Memorandum beginning after the first indented quotation. All changes reflect the Commission's analysis of the case.

Being fully advised in the premises, the Commission makes and issues the following

FINDINGS OF FACT

1. At all relevant times, the Appellant's position with the Respondent has been formally classified at the Supervising Officer 2 (Captain) level.

2. The key distinction between the Supervising Officer 1 (Lieutenant) and Captain classifications, as identified in the applicable civil service classification specifications, is that the Lieutenant serves as an "assistant shift supervisor" in a prison while the Captain is the "supervisor of a shift" within a prison. In addition, the specifications for Lieutenant specifically refer to supervising the transportation of inmates, which can include planning the transportation, escorting the inmates between institutions, and operating motor vehicles ranging from a car to a bus. The Captain specifications do not mention transporting prisoners except in the context of crisis intervention.

SUPERVISING OFFICER 1

This is responsible supervisory work as an assistant shift supervisor within a secure adult facility or as the supervisor of the transportation of inmates in institutions which require the movement of a significant number of inmates. Employees in this class are responsible for the supervision of the provision of security for inmates, staff and the public within a secure adult facility or while the inmates are outside the perimeter of a secure adult facility. Work is performed in accordance with established rules, regulations and policies under the general direction of a higher level security or management position.

Examples of Work Performed:

- Schedule, supervise and train correctional officers.
- Develop and revise work schedules and assignments to meet staffing and program needs.
- Interpret department, division and institution policies, procedures and rehabilitative goals to security staff and inmates.
- Serve as security staff representative on Program Review Committee and Disciplinary Committee.
- Verify counts of all inmates assigned to the institution.
- Conduct inspections for safety, sanitation and security of the institution.
- Ensure that proper control is maintained of keys, tools and weapons.
- Supervise discipline and transfers of inmates and arrange for emergency treatment of inmates as needed.
- Respond to first step grievances, investigate and report alleged violation of work rules by subordinate staff.
- Recommend changes to enhance security policies and procedures.
- Handle crisis calls throughout the institution.
- Plan and supervise the transportation of inmates.
- Escort inmates between institution[s], county jails, hospitals, courts, funerals, deathbed visits and revocation hearings.
- Inspect vehicles for security violations and search for contraband.
- Search and screen the belongings of inmates being transported.
- Operate motor vehicles ranging in size from a car to a bus.
- Assist the shift supervisor by carrying out special assignments and projects.

SUPERVISING OFFICER 2

This is responsible supervisory work as the supervisor of a shift within a secure adult facility Employees in this class are responsible for the supervision of the provision of security for inmates, staff and the public within a secure adult facility Work is performed in accordance with established rules, regulations and policies under the general direction of a higher level security or management position.

Examples of Work Performed:

- Direct, supervise and review the work of all correctional officers assigned to a shift, correctional center, farm or University of Wisconsin Hospital Security Unit.
- Schedule all officers and insure that all posts are properly manned.
- Make regular inspection tours of inmate dormitories, cell halls, buildings and grounds.

- Act as chief security officer of the institution during evening hours and in the absence of the Security Director or designee.
- Implement policies and procedures and interpret them to lower level officers and inmates.

...

- Interpret the climate of the institution as it relates to overall inmate behavior and activity.
- Assist the security director in determining the effectiveness of the security program and effectively [recommend] necessary changes in policies or procedures.
- Consult with institution departments regarding specific security requirements and coordinate with these departments to resolve problems.
- Review all conduct reports issued and make appropriate recommendation[s] to security director for major or minor hearing actions.
- Quell disturbances that arise within the institution or on a unit.
- Perform crisis intervention and transport, transfer and place inmates in the security unit as necessary.
- Handle emergency situations such as escapes and injuries.

...

- Maintain records and prepare reports.

3. As used in this decision, the term “white shirts” refers to both Lieutenants and Captains. Correctional Officers, and Sergeants are referred to as “blue shirts.”

4. At those prisons relevant to the present dispute, the Security Director of each institution makes a “duty assignment” for each white shirt. The duty assignment reflects a particular set of duties on one or more shifts that the white shirt can expect to perform on a regular basis, except where vacation or sick leave require a different duty for a particular day or period. The Security Director has the discretion to issue new duty assignments at any time. Examples of duty assignments for Captains are: 1st Shift Commander, 1st and 2nd Shift Relief Commander, and Administrative Captain. Sample duty assignments for Lieutenants are: 1st Shift Assistant Commander, and 2nd Shift Relief Assistant Commander. Duty assignments are typically¹ not reflected on an employee’s position description. For purposes of this appeal, all Captains have a generic position description and all Lieutenants have a different, but generic, position description.

5. Scot Galligan, the Appellant in this matter, began working at Kettle Moraine Correctional Institution (Kettle Moraine) in 1989, was promoted to Lieutenant in 1999, and then to Captain in 2004. During the relevant time period in 2008, Appellant had the Segregation Captain duty assignment which placed him in charge of the Segregation Unit at Kettle Moraine. Segregation Captain hours are from 8:00 a.m. to 4:00 p.m., Monday through Friday.

¹ The Commission has added the word “typically” to the language in the proposed decision because of the Charles Pearce “Supervising Officer 2 – Program Captain” position description that is of record.

6. At all relevant times, Appellant has preferred to work an 8:00 a.m. to 4:00 p.m. assignment, rather than 1st shift (6:00 a.m. to 2:30 p.m.), 2nd shift (2:00 p.m. to 10:30 p.m.), or 3rd shift (10:00 p.m. to 6:30 a.m.).²

7. Michael Dittmann was the Warden of Kettle Moraine during the relevant time period and was the appointing authority for Kettle Moraine personnel.

8. By September 2008, allegations had arisen that the Appellant was using a recording pen to surreptitiously record conversations of his co-workers. Some of the conversations were with Warden Dittmann. Appellant was placed on paid administrative leave on September 8, 2008, “pending investigation of alleged misconduct.” He remained in that status until November 17 when he was temporarily assigned to fill the vacant Assistant Superintendent position at Winnebago Correctional Center. Winnebago is a correctional camp rather than a traditional prison. Appellant’s work schedule at Winnebago was Monday through Friday from 8:00 to 4:00.

9. Because the investigation related, in part, to recordings of Appellant’s conversations with Warden Dittmann, the decision as to whether Appellant would be disciplined was placed in the hands of Division of Adult Institutions Administrator John Bett. Assistant Division Administrator Denise Symdon recommended that Bett issue Appellant a written reprimand. Warden Dittmann would have preferred a suspension.

10. By letter dated December 18, 2008, Administrator Bett issued a written reprimand to the Appellant:

This written reprimand is being issued because you violated Department Work Rule, #2: Failure to follow policy or procedure

This action is being taken based on your having violated DAI Policy 306.00.01, Electronic Monitoring Surveillance, by recording staff without their knowledge and without the DOC Secretary’s authorization on numerous occasions during the timeframe of approximately January 2004 – September 3, 2008. Specifically

11. Management believes that labor/management relations at Kettle Moraine have been poor for years. Assistant Administrator Symdon and Administrator Bett concluded that Appellant’s surreptitious recording of staff conversations at Kettle Moraine further undermined the union’s willingness to trust the prison’s management. They also concluded, based on the investigation, that Appellant’s credibility with management at Kettle Moraine had been severely undermined. They believed that Appellant could not continue to have a successful career at Kettle Moraine but that a fresh start at a different institution could yield a positive result.

²The times listed in this finding are for white shirts rather than blue shirts.

12. Administrator Bett issued Appellant a second letter dated December 18, 2008:

This letter is official notice that you are being reassigned to the position of Supervising Officer 2, at Dodge Correctional Institution, effective January 4, 2009.

Your pay will remain the same

This reassignment is a result of your admitting actions and behavior which you revealed during a recent investigation into the use of a personal recording device within the workplace. You recorded conversations and meetings without the knowledge of the other participants and without the authorization of the Secretary of the Department. This conduct has affected your credibility and the trust that management and line staff have in your leadership. It also demonstrates a significant lack of good judgment.

As a supervisor and member of the correctional management team at Kettle Moraine Correctional Institution, you were privileged to private and confidential information and conversation. Your method of recording staff and supervisors without their knowledge or consent broke the trust given you by virtue of your position.

Your actions have created an environment of mistrust in which those with whom you work would be uncomfortable, not knowing if they could speak freely or express thoughts or opinions of a sensitive or dissenting nature in your presence. Your ability to have an effective working relationship with your supervisors, peers and subordinates has been severely compromised. Your ability to work effectively as a supervisor at KMCI has been damaged. As a result I have reached a decision to reassign you to another institution.

Please report to [Dodge Security Director] Rick Phillips, at 7:45 a.m. on Monday, January 5, 2009 for orientation and assignment of duties.

Appellant had not requested the move from Kettle Moraine to Dodge Correctional Institution (Dodge). He had never worked at Dodge, which was one reason that Symdon and Bett believed Appellant could be successful there.

13. Dodge was already fully staffed with white shirts and did not have a vacancy at the time of the move.

14. Appellant's position and position number were moved from Kettle Moraine to Dodge. Kettle Moraine continued to pay Appellant's salary for a limited period after January 5, 2009, and operated with one fewer white shirt position for the next several months.

15. Dodge serves as the intake center for the State's prison system, processing over 8000 new inmates a year who are then dispersed to prisons located throughout the state. As a consequence, Dodge provides nearly all prisoner transportation for the State.

16. During the relevant time period, Tim Lundquist was the Warden at Dodge, James Schwochert was Deputy Warden, and Rick Phillips was Security Director.

17. The normal staffing complement of white shirts at Dodge was eight Captains and 10 Lieutenants. Immediately prior to the Appellant's arrival, the duty assignments were identified as follows:

Captains

- a. Administrative Captain: Duties include daily scheduling of the supervisors.
- b. Program (i.e. Segregation) Captain
- c. Disruptive Group Coordinator: Duties are gang-related.
- d. Transportation Captain: Responsible for setting the schedule for all transportation trips to be conducted on the following work day.³
- e. 1st Shift Commander⁴
- f. 2nd Shift Commander
- g. 1st and 2nd Shift Relief Commander: Duties are to fill in for either the 1st Shift Commander or the 2nd Shift Commander for weekends, vacations and sick leave.
- h. 3rd Shift Commander

Lieutenants

- a. Training Supervisor
- b. Bus: One white shirt must be on each bus used for transporting prisoners.
- c. Bus: Two buses are typically deployed daily.
- d. 1st Shift Assistant Commander
- e. 2nd Shift Assistant Commander
- f. 1st and 2nd Shift Relief Assistant Commander
- g. 3rd Shift Assistant Commander
- h. 3rd Shift Assistant Commander
- i. All Shifts Vacation/Holiday Relief
- j. All Shifts Vacation/Holiday Relief

18. A Lieutenant is often assigned, on a day-to-day basis, to fill a Captain's duty assignment in the absence of an available Captain. Lieutenants and Captains are typically cross-trained.

³ Because the responsibilities of the Transportation Captain are so specific, it takes approximately three weeks of one-on-one training in order to function adequately in that capacity.

⁴ "Shift Commander" equates to the term "supervisor of a shift" that is used in the relevant class specifications. The term "Shift Assistant Commander" equates to "assistant shift supervisor" in the same specifications.

19. A Captain may also fill a Lieutenant's duty assignment on a day-to-day basis, but this usually occurs when the Captain wishes to earn overtime pay.

20. Rather than dislodging any of the Captains already at Dodge, Security Director Phillips, after discussion with Warden Lundquist, decided to create an All Shifts Vacation/Holiday Relief⁵ duty assignment for the Appellant. Many believe that all shift relief has the least desirable hours of any duty assignment. By creating this duty assignment, Dodge had additional flexibility in scheduling and its overtime costs were reduced.⁶

21. Security Directory Phillips considers length of experience at Dodge as one factor in making duty assignments. He believes that supervisors who have been at Dodge the longest will know the operations best. Phillips concluded that it would be unfair to change the duty assignments of any other white shirt at Dodge by inserting Appellant into something other than the new assignment.

22. Security Director Phillips, Warden Lundquist and Dodge Human Resources Director Rene Marquardt all considered Appellant's duty assignment to be temporary until such time that one of the other eight Captain positions became vacant and the All Shifts Vacation/Holiday Relief duty assignment for a Captain could be eliminated.

23. The Administrative Captain made day-to-day assignments of the Appellant and the other white shirts at Dodge.

24. During the period from January 5, 2009 until the beginning of December 2009, the Appellant worked 189 shifts at Dodge, including 3 overtime shifts. He spent those shifts in one of the following capacities:

- a. As the Shift Commander (referred to in the next finding as Commander) on one of the three shifts.
- b. As an extra white shirt (Extra) for the period between 8:00 a.m. and 4:00 p.m. where he would pick up or share an amalgam of white shirt duties that are not cleanly described by a single duty assignment. The duties performed while working in the role of an "extra" white shirt included relieving persons in Captain duty assignments and Lieutenant duty assignments of a portion of their workload.
- c. As the Assistant Shift Commander (Assistant) on one of the three shifts.
- d. As the white shirt on a bus transporting prisoners (Bus).
- e. Being trained, providing training, performing light duty, or conducting a Prison Rape Elimination Act investigation (Other).

⁵ This term corresponds to the "Vacation/Holiday/Transportation Relief" assignment referenced in the statement of issues for hearing.

⁶ The reduction in overtime costs translated into a loss in overtime earnings for white shirts who had been on staff prior to Appellant's arrival.

At Dodge, only Lieutenants receive duty assignments for Assistant Shift Commander and Bus. Other than the Appellant, Captains were only rarely scheduled for a shift as Assistant Shift Commander or for the Bus and then it is typically on a voluntary basis.

25. During the period from January 5, 2009 until the beginning of December 2009, the Appellant worked the following shifts, with overtime shifts in parentheses:⁷

	January	February	March	Subtotal ⁸
Commander			3	3
Extra	3	16	10	29
Assistant	2	1	1	4
Bus			2	2
Other	11	1	2	14
Total shifts	16	18	18	52

	April	May	June	Subtotal ⁹
Commander	2	3	6½	11½
Extra	4	2		6
Assistant	7	11	8½ (1)	26½ (1)
Bus	5	4	6	15
Other		1		1
Total shifts	18	21	21 (1)	60 (1)

⁷ The data in these tables are derived in part from listings found in the Appellant's post-hearing brief. A number of corrections have been made after considering specific testimony and various exhibits.

⁸ As explained in the Memorandum, the Commission finds that during these three months and because of the predominance of his day-to-day responsibilities as an "Extra" white shirt and performing "Other" duties, the Appellant has not shown that the majority of this period was spent in the role of a Lieutenant.

⁹ As explained in the Memorandum, the Commission finds that during these three month and because of the predominance of his day-to-day responsibilities as an "Assistant" and on a "Bus," the majority of this period was spent in the role of a Lieutenant.

	July	August	Sept.	Oct.	Nov. ¹⁰	Subtotal	Total ¹¹
Commander	5½	9	15 (1)	12	6	47½ (1)	62 (1)
Extra			5	1		6	41
Assistant	3½	1 (1)	2	3	1	10½ (1)	41 (2)
Bus		1		3	1	5	22
Other				1	4	5	20 ¹²
Total shifts	9	10 (1)	22 (1)	20	12	74 (2)	186 (3)

26. The Lieutenant position with the 2nd Shift Assistant Commander duty assignment at Dodge became vacant in May 2009 and the position number was sent to Kettle Moraine to adjust for having received the Appellant's position in January of the same year. From May 2009 until Captain Waltz retired near the end of the year, Dodge operated with 18 white shirt positions, including nine designated at the Captain level and nine at the Lieutenant level. Once at Kettle Moraine, the position from Dodge was reclassified to the Supervising Officer 2 (Captain) class and subsequently filled at that level. Appellant sought to fill the vacancy at Kettle Moraine but was unsuccessful.

27. Captain Jon Waltz, who had the Administrative Captain duty assignment when Appellant arrived at Dodge, became seriously ill in June 2009 and began a lengthy sick leave at that time. On an interim basis and until October 9, the Captain with the 1st and 2nd Shift Relief duty assignment filled in as the Administrative Captain and this caused a shift in the Appellant's daily assignments.

28. On October 9, 2009, Security Director Phillips began making duty assignment changes to reflect a formal vacancy in the position formerly held by Captain Waltz. Appellant requested various assignments on more desirable shifts, but Phillips placed the Appellant into the 3rd Shift Commander assignment. By email dated November 23, 2009, Phillips notified Appellant and the other white shirts of this and other changes in the duty assignments that were effective December 6, 2009. The position formerly held by Captain Waltz was reclassified to the Lieutenant level and filled so that Dodge returned to a complement of eight Captains and 10 Lieutenants.¹³

¹⁰ Appellant's new duty assignment of 3rd Shift Commander was effective December 6, 2009, and he did not work any shifts between December 1 and that date.

¹¹ As explained in the Memorandum, the Commission finds that because of the predominance during these six months of his day-to-day responsibilities as a "Commander," the majority of the Appellant's time was spent in the role of a Captain.

¹² The 20 shifts in this category included 15 for training and three for light duty.

¹³ The Commission has expanded this finding by adding the effective date of the change in Appellant's duty assignment as well as the final sentence.

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

CONCLUSIONS OF LAW

1. The Commission has the authority to review this matter pursuant to Sec. 230.44(1)(c), Stats.
2. The Appellant has the burden to establish that his permanently assigned duties at Dodge were better classified at the Supervising Officer 1 (Lieutenant) level rather than the Supervising Officer 2 (Captain) level, and that the Respondent intended to further discipline the Appellant by assigning him those duties.
3. The Appellant has failed to sustain that burden.
4. Appellant's duties during the relevant time period at Dodge were not better described at the Lieutenant level and, prior to December 6, 2009, were not permanently assigned.
5. Appellant was not constructively demoted.

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

ORDER¹⁴

The appeal is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 18th day of April, 2011.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

¹⁴ 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.

Department of Corrections (Galligan)

MEMORANDUM ACCOMPANYING DECISION AND ORDER

The Appellant, a prison supervisor, contends that the Respondent constructively demoted him when it assigned him a new collection of duties at Dodge Correctional Institution that he asserts was more properly classified at the Supervising Officer 1 (Lieutenant) level rather than at the Supervising Officer 2 (Captain) level. The move from Kettle Moraine to Dodge occurred at the same time that Respondent issued the Appellant a written reprimand for surreptitiously recording his conversations with other staff at Kettle Moraine.

In order to establish the elements of a constructive demotion, an employee must show a change in permanently assigned duties so substantial that the new duties are better described at a lower classification level, and must show that the change was motivated by an intent to discipline the employee. DNR (GRUENTZEL), DEC. NOS. 32352, 32353 (WERC, 2/2008):

Under certain circumstances, the Commission has found that an employing agency has *constructively* demoted an employee even though there has been no action to formally change the classification level of the employee's position. If an agency modifies an employee's duties so they are better described in a lower classification and is motivated in doing so by an intent to discipline the employee, the agency may not avoid a just cause review of the action by calling it a mere reassignment of duties. 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. Just as in any other classification analysis, the determination of the proper class of the new collection of duties has to be based upon the duties that have been permanently assigned to the employee. . . . [T]emporary lower level work may not serve as the basis for finding a constructive demotion. (Citation omitted, emphasis in original.)

Given the record before us, we only find it necessary to address the question of the proper classification of the Appellant's duties at Dodge.

Duties performed

Appellant and his position moved from Kettle Moraine to Dodge effective January 5, 2009. The standard complement of white shirts at Dodge was eighteen (eight Captains and 10 Lieutenants) and Appellant was the nineteenth. He was initially designated to work in a highly flexible relief capacity so that on a day-to-day basis, he might fill a duty assignment normally performed by one of nearly all of the other white shirts at the institution or even fill in for them task-by-task. Most of the white shirts had specific "duty assignments," so they could reasonably expect to work on a particular shift and with a particular set of duties. However, white shirts are generally cross-trained so that nearly anyone can fill in for nearly everyone else.

The Supervising Officer classification series includes separate definitions and work examples for the Lieutenant and Captain levels. The major distinction expressed in the definition statements is that Captains typically are the supervisor (“Commander” or “Shift Commander”) for the security personnel on a given shift within a correctional institution, while the Lieutenants work as an assistant shift supervisor (“Assistant Shift Commander”). The Lieutenant class also includes supervisors who are involved in the transportation of inmates throughout the State. Policy requires that one Supervising Officer be present on each bus transporting inmates.

After his move to Dodge, Appellant received some assignments that were normally performed by a Captain and some assignments that were normally performed by a Lieutenant. His daily assignment typically fell into one of five categories: 1) the Shift Commander for one of the three shifts for line supervisors; 2) the Assistant Shift Commander for any of the same shifts; 3) a white shirt on a bus transporting prisoners; 4) an “extra” white shirt for the 8:00 to 4:00 shift with a variety of white-shirt duties not identified by a single duty assignment; and 5) training and light duty (referenced here as “other”).

The “extra” and “other” categories of daily assignments are not inherently Captain-level or Lieutenant-level responsibilities. Time spent in training and performing light duty cannot, at least on this record, be better identified in one classification than the other. The record also reflects that when serving in the role of an “extra” white shirt, Appellant relieved other supervisors of specific duties they would normally perform and that these duties came from both Lieutenants and Captains. We conclude, therefore, that the Appellant has not sustained his burden of showing that his responsibilities in either an “extra” or “other” capacity are more properly classified as Lieutenant-level work.¹⁵

The Findings of Fact include charts that break down the Appellant’s daily responsibilities during three segments of his tenure at Dodge. During January, February and March of 2009, the majority of the Appellant’s shifts were spent working in an “extra” or “other” capacity. Appellant’s next three months were dominated by shifts as Assistant Commander and as the white shirt supervising staff on a bus. The clear majority of his shifts during the following six months, from July through November, were as Shift Commander. The Dodge Security Director formally placed Appellant into the 3rd Shift Commander duty assignment beginning December 6, 2009 and Appellant continued with that assignment until the date of hearing.

In order to satisfy the burden of proof in this matter, the Appellant must show that his permanently assigned duties at Dodge are a better fit with the Lieutenant classification than the Captain classification. He was only able to show that the majority of his duties during April,

¹⁵ In an appeal of a classification decision, the appellant has the burden of showing, by a preponderance of the evidence, that his position is correctly classified at the requested level, rather than merely showing that the decision to classify his position at the level identified by the employer was incorrect. *ELLINGSON V. DNR & DER*, CASE NO. 93-0057-PC (PERS. COMM. 5/28/1996).

May and June were consistent with the lower class. He failed to make a similar showing for the duties he performed during January, February and March. In addition, the evidence very clearly shows that his actual duties beginning in July of 2009 were better described by the Captain classification.

Irrespective of whether or not Appellant's duties at Dodge were permanent rather than temporary, the Appellant has failed to show that his day-to-day responsibilities were best described by the Lieutenant classification rather than the Captain class.

Temporary vs. permanent duties

The parties agree that Respondent intended the movement of the Appellant's position from Kettle Moraine to Dodge, effective January 4, 2009, to be permanent, but disagree as to the permanence of his initial duties once at Dodge. If temporary, the duties are not to be considered for purposes of assessing the classification of the position. A position's classification should only be premised upon permanent responsibilities. The Commission decides the question of permanence based upon the preponderance of the evidence. *CARROLL V. DER*, CASE NO. 86-0112-PC (PERS. COMM. 1/8/1987).

The Appellant has been able to show that he was performing predominantly Lieutenant-level duties during a single three-month period part-way through his tenure at Dodge, but he was unable to make a similar showing for the preceding three months as well as the succeeding period of at least six months. The variability of Appellant's duties after his arrival at Dodge supports the testimony of management that his responsibilities would change once there was a vacancy in any one of the nine Captain positions.

After some period of time and under certain circumstances, even temporary duties may be considered "permanent" for classification purposes. *GUTIERREZ V. DOT & DER*, CASE NO. 96-0096-PC (PERS. COMM. 4/11/1997). ("Work performed on a temporary basis does not qualify a position for reclassification unless the work has been performed for a number of years and the timing of future changes cannot be predicted with any degree of certainty.") Also see, *MILLER V. DHSS & DER*, CASE NO. 91-0129-PC (PERS. COMM. 5/1/1992); *FREDISDORF ET AL. V. DP*, CASE NO. 80-300-PC (PERS. COMM. 3/19/1982). The Appellant was clearly performing predominantly Captain-level duties after his sixth month at Dodge and his responsibilities never wavered thereafter. Under these circumstances, the Appellant was never assigned predominantly Lieutenant-level responsibilities on a permanent basis at Dodge, even though he may not have been informed explicitly that any such responsibilities would be temporary.

The evidence is clearly inconsistent with a conclusion that Appellant's permanently assigned duties were better described by the Lieutenant classification.

Less desirable duties at the same classification level

The Commission recognizes that Appellant was involuntarily moved from a position assigned to a fixed and desirable shift with consistent responsibilities at Kettle Moraine to a mixed-shift position with highly variable responsibilities at Dodge. Almost any employee would view this change negatively and would consider it to be a move to a position with less stature. However, the Commission only has been granted the authority to review those State civil service personnel actions described in Sec. 230.44(1) and 230.45(1), Stats. “Demotion” has an express meaning for purposes of Sec. 230.44(1)(c), Stats., as has been set forth in preceding portions of this Memorandum. The Commission lacks the authority to review employment changes that might meet a different definition of “demotion” or an appellant’s subjective sense of having been demoted. THIEL v. DOT, DEC. NO. 31725-A (WERC, 12/2009).

Because the Appellant has failed to show he was constructively demoted, the appeal must be dismissed.

Dated at Madison, Wisconsin, this 18th day of April, 2011.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner