

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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JASON SIMINOW, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0193

Case Type: PA

DECISION NO. 36919-A

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**Appearances:**

Jason Siminow, 3328A South 11th Street, Sheboygan, Wisconsin, appearing on his own behalf.

Mark A. Herman, Department of Administration, 101 E. Wilson Street, 10th Floor, Post Office Box 7864, Madison, Wisconsin, appearing on behalf of State of Wisconsin, Department of Corrections.

**DECISION AND ORDER**

On February 6, 2017, Jason Siminow filed an appeal with the Wisconsin Employment Relations Commission, asserting that he had been suspended from his employment for one day without just cause by the State of Wisconsin Department of Corrections. He subsequently amended his appeal to also challenge his involuntary transfer from an office in Sheboygan to an office in Saukville.<sup>1</sup> The Commission assigned the appeal to Hearing Examiner Karl R. Hanson who conducted a hearing on March 23, 2017, in Saukville, Wisconsin. Siminow made an oral argument at the conclusion of the hearing. The Wisconsin Department of Corrections filed a written argument on March 29, 2017. Any response from Siminow was due April 3, 2017; none was filed.

On April 11, 2017, Examiner Hanson issued a Proposed Decision and Order. No objections were filed and the matter became ripe for Commission consideration on April 18, 2017.

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

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<sup>1</sup> By order dated March 21, 2017, the Commission permitted Siminow to amend his appeal and denied DOC's motion to dismiss the amendment for lack of jurisdiction.

### **FINDINGS OF FACT**

1. Jason Siminow is employed by the State of Wisconsin Department of Corrections and had permanent status in class at the time he was suspended from his employment for one day.
2. On July 27, 2016, Siminow was disrespectful to his supervisor at the Sheboygan Division of Community Corrections office.
3. On November 11, 2016, DOC suspended Siminow for one day for allegedly violating two work rules.
4. On December 2, 2016, DOC notified Siminow that he was involuntarily transferred to a position in the Saukville Division of Community Corrections office, effective on December 11, 2016.
5. The Director of the Bureau of Merit Recruitment and Selection, Division of Personnel Management, Department of Administration, was not served with Siminow's appeal and did not participate in the March 23, 2017 hearing.

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

### **CONCLUSIONS OF LAW**

1. The Wisconsin Employment Relations Commission has jurisdiction to review Jason Siminow's one-day suspension pursuant to § 230.44(1)(c), Stats.
2. The State of Wisconsin Department of Corrections had just cause within the meaning of § 230.34(1)(c), Stats., to suspend Jason Siminow for one day.
3. The Wisconsin Employment Relations Commission has jurisdiction to review Jason Siminow's involuntary transfer pursuant to §§ 230.44(1)(a) and (1)(c), Stats.
4. Jason Siminow was not demoted, within the meaning of § 230.44(1)(c), Stats., when he was transferred to the Saukville Division of Community Corrections office.
5. The Director of the Bureau of Merit Recruitment and Selection, Division of Personnel Management, Department of Administration, is a necessary party to Jason Siminow's appeal pursuant to § 230.44(1)(a), Stats., regarding the decision to transfer him to Saukville.

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

**ORDER**

1. Jason Siminow's one-day suspension is affirmed.
2. Jason Siminow's appeal against the State of Wisconsin Department of Corrections, pursuant to § 230.44(1)(c), Stats., related to his involuntary transfer is dismissed.
3. Jason Siminow's appeal, pursuant to § 230.44(1)(a), Stats., regarding the decision of the Director of the Bureau of Merit Recruitment and Selection, Division of Personnel Management, Department of Administration, to involuntarily transfer him, shall be served upon the Director of the Bureau of Merit Recruitment and Selection and heard as a separate matter, if Siminow first pays the required \$50 filing fee within 30 days of the date of this order.<sup>2</sup>

Signed at the City of Madison, Wisconsin, this 1st day of May 2017.

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

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James R. Scott, Chairman

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Rodney G. Pasch, Commissioner

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James J. Daley, Commissioner

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<sup>2</sup> The Commission is required to charge a filing fee for appeals brought pursuant to § 230.44(1)(a), Stats., and has set the fee at \$50.

**MEMORANDUM ACCOMPANYING DECISION AND ORDER**

**I. One Day Suspension.**

Section 230.34(1)(a), Stats., provides in pertinent part the following as to certain employees of the State of Wisconsin:

An employee with permanent status in class ... may be removed, suspended without pay, discharged, reduced in base pay, or demoted only for just cause.

Section 230.44(1)(c), Stats., provides that a State employee with permanent status in class:

... 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.

Jason Siminow had permanent status in class at the time he was suspended from his employment with the State of Wisconsin Department of Corrections for one day, and his appeal alleges that the discipline was not based on just cause.

The State has the burden of proof to establish that Siminow was guilty of the alleged misconduct and whether the misconduct constitutes just cause for the discipline imposed. *Reinke v. Personnel Bd.*, 53 Wis.2d 123 (1971); *Safransky v. Personnel Bd.*, 62 Wis.2d 464 (1974).

Siminow and other DOC agents at the Sheboygan Division of Community Corrections (“DCC”) office received an email on July 26, 2016, from their supervisor, Holly Rick, which notified them of a meeting the following week. Siminow replied to Rick’s message expressing displeasure at what he considered insufficient notice for the meeting. Later in the day, Siminow told Rick, “this is a poorly run business, it is terribly run.”

On July 27, 2016, Siminow made a loud outburst in the office’s hallway after discovering that an offender under his supervision was taken into custody overnight. Siminow then entered Rick’s office. Rick attempted to calm Siminow. In response, Siminow loudly told Rick something to the effect of, “Do you want to know what people think of you. You were a terrible agent. You couldn’t do your job and everyone is talking about it.”

During his years of employment in DOC, Siminow received warnings and a negative performance evaluation for similar conduct.<sup>3</sup> In January 2015, Siminow completed an emotional survival training course to help him deal with situations at work. This training seemed to help him for a time, but after several months he stopped employing the techniques taught in the course. DCC Administrator Denise Symdon took this into account when deciding the level of discipline necessary to correct Siminow’s behavior.

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<sup>3</sup> Siminow challenges the facts underlying some of the warnings given to him. Nonetheless, he was on notice that certain unprofessional and disrespectful behavior was unacceptable to DOC.

Constructive criticism within an organization may be positive and ought to be encouraged when and where appropriate. Siminow, however, was merely complaining on July 26 and 27, 2016. When Siminow's supervisor attempted to talk with him about the complaints, Siminow responded by personally attacking her. He did so loudly enough that others in the office could hear him. Siminow's statements to Rick on July 27, 2016 were plainly disrespectful. Given the loud, unnecessary, and confrontational nature of Siminow's comments to Rick, discipline was warranted. Based upon Siminow's failure to modify his behavior after prior warnings and training, the one-day suspension was not excessive.

## **II. Involuntary Transfer.**

The Commission has jurisdiction over appeals related to employee transfers in three circumstances. Based upon the claims asserted by Siminow and the record subsequently developed on March 23, 2017, two statutory sources provide the Commission jurisdiction to hear Siminow's claims regarding his involuntary transfer from the DCC office in Sheboygan to the DCC office in Saukville.<sup>4</sup>

### **A. Section 230.44(1)(c), Stats. – Demotion by Punitive Transfer.**

As briefly discussed in our March 21, 2017 order in this matter, the Commission has jurisdiction over punitive transfers that amount to demotion. The authority for such jurisdiction is found in § 230.44(1)(c), Stats. That section provides the Commission jurisdiction over demotions generally. The Commission has discussed our authority to review punitive transfers claimed to be demotions in several cases. *See Thiel v. DOT*, Dec. No. 31726-A (WERC, 12/2009); *Wasmer v. DOJ*, Dec. No. 36176 (WERC, 2/2016); and *Hompe v. DOC*, Dec. No. 36745 (WERC, 11/2016). It is Siminow's burden to show that the Commission has jurisdiction under § 230.44(1)(c), Stats.

Siminow was temporarily assigned to work in the Saukville DCC office on August 15, 2016, until the investigation into his July 2016 conduct concluded. At the time, he resided in Saukville and had commuted to work at the DCC Sheboygan office.

On December 2, 2016, Siminow notified DOC that he had moved to Sheboygan. Later the same day, he received a letter from Symdon notifying him of his permanent and involuntary transfer to the DCC Saukville office. Symdon testified that Siminow was transferred in order to give him a fresh start.

For some period of time before his temporary transfer, Siminow commuted from his home in Saukville to his office in Sheboygan. The timing of his residential move is unfortunate and, perhaps, ironic. In light of his prior commute from Saukville to Sheboygan, it can hardly be

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<sup>4</sup> The third source of jurisdiction for the Commission does not apply here. The Commission also has jurisdiction to hear claims brought as the final step in the State's non-disciplinary grievance procedure created pursuant to § 230.09(14), Stats., and Wis. Admin. Code ch. ER 46. Under those provisions, the Commission does not have authority to review a transfer *per se*. Rather, we have jurisdiction to hear grievances alleging that an agency made a transfer, punitive or not, without first obtaining the statutorily required approval of the Bureau of Merit Recruitment and Selection Director. *See Galligan v. DOC and Admin., Div. of Merit Recruitment and Selection*, Dec. No. 32987, (WERC, 2/2010); *Stasny v. DOT and Admin., Div. of Personnel*, Dec. No. 79-217-PC (Pers. Comm., 1/1981); *Stasny v. State Pers. Comm.*, Dane County Cir. Ct. Case No. 79CV6130 (2/1981).

said that his new commute from Sheboygan to Saukville shows Siminow was demoted. Siminow has not demonstrated that the transfer amounted to a demotion. His claim against DOC pursuant to § 230.44(1)(c), Stats., is dismissed.

**B. Section 230.44(1)(a), Stats. – Appeal of Transfer Decision Made by the Bureau of Merit Recruitment and Selection Director.**

Pursuant to § 230.44(1)(a), Stats., the Commission also has jurisdiction over appeals related to the decision to transfer an employee. Specifically, a State employee may appeal to the Commission, a “personnel decision under this subchapter [Subchapter II, Civil Service, Chapter 230, Stats.] made by the director [of the Bureau of Merit Recruitment and Selection, Division of Personnel Management, Department of Administration] or by an appointing authority under authority delegated by the director.” Section 230.29, regarding employee transfers, is within Subchapter II of Chapter 230, Stats.

The statutes and the Commission do not require form pleadings in order to invoke the Commission’s jurisdiction. The Commission affords employees, particularly those representing themselves, latitude in presenting appeals.

Symdon testified that the Division of Personnel Management made the decision, at her recommendation, to transfer Siminow from the DCC Sheboygan office to the DCC Saukville office. This is consistent with the requirement of § 230.29, Stats., which provides “[a] transfer may be made from one position to another only if specifically authorized by the director [of the Bureau of Merit Recruitment and Selection].” Symdon testified that she obtained the required approval before she signed the letter notifying Siminow of his transfer.

It is understandable that Siminow would believe that DOC and Symdon, who signed the December 2, 2016 letter, and not the Director of the Bureau of Merit Recruitment and Selection (“BMRS”), ordered his transfer. DOC never notified Siminow that the transfer decision was made by the BMRS Director.<sup>5</sup> Therefore, his mistake in making his appeal regarding the transfer against DOC, and not against the BRMS Director, is excusable.

Siminow has the right to appeal a transfer decision made by the BMRS Director. The Commission has jurisdiction to hear such an appeal pursuant to § 230.44(1)(a), Stats. See *Galligan v. DOC and Admin., Div. of Merit Recruitment and Selection*, Dec. No. 32987 (WERC, 2/2010).

The Commission will serve Siminow’s amended appeal, related to his involuntary transfer to the DCC Saukville office, on the Bureau of Merit Recruitment and Selection Director,

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<sup>5</sup> Nor did DOC, which was represented by the Wisconsin Department of Administration (which includes BMRS), notify the Commission of this information or move to join the BMRS Director as a necessary party.

the proper respondent.<sup>6</sup> That matter shall be scheduled for hearing if Siminow pays the applicable filing fee.<sup>7</sup>

Signed at the City of Madison, Wisconsin, this 1st day of May 2017.

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

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James R. Scott, Chairman

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Rodney G. Pasch, Commissioner

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James J. Daley, Commissioner

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<sup>6</sup> The burden in an appeal, pursuant to § 230.44(1)(a), Stats., is with the appellant. Siminow must prove that the BMRS Director's decision "was incorrect in that it violated civil service administrative code rule or statute." *See Stasny v. DOT and Admin., Div. of Personnel*, Dec. No. 79-217-PC (Pers. Comm., 1/1981).

<sup>7</sup> If Siminow and the BMRS Director agree, the record created on March 23, 2017 may be included as part of or as the entire evidentiary record in the separate appeal pursuant to § 230.44(1)(a), Stats., related to the BMRS Director's decision to transfer Siminow from a position in Sheboygan to one in Saukville.