

STATE OF WISCONSIN

PERSONNEL COMMISSION

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ROBERT COHEN,
Appellant,

v.

Secretary, DEPARTMENT OF
HEALTH AND SOCIAL SERVICES,
Respondent.

Case Nos. 84-0072-PC,
85-0214-PC, 86-0031-PC

* * * * *

ROBERT COHEN,
Appellant,

v.

Secretary, DEPARTMENT OF
HEALTH AND SOCIAL SERVICES
and Secretary, DEPARTMENT OF
EMPLOYMENT RELATIONS,
Respondents.

Case No. 84-0094-PC

* * * * *

INTERIM
DECISION
AND
ORDER

These matters are before the Commission on respondent's objection to an issue identified for hearing in an Interim Order dated June 25, 1986.

Three of these cases, 84-0072-PC, 84-0094-PC and 85-0214-PC, are based on appellant's allegations that he was demoted from his position as Director of the Bureau of Social Security Disability Insurance (BSSDI) to a position of Director of the HMO/AFDC Project (hereafter referred to as HMO Project Director). Appellant's fourth case arises from a layoff decision. In its June 25th Interim Decision and Order, the Commission established the following issues for hearing, subject to any subsequent jurisdictional rulings:

1. Was the appellant demoted, constructively or otherwise, to the position of HMO Project Director?

Subissue: What was the proper classification of the HMO Project Director position?

2. If the appellant was demoted, was the demotion for just cause?
3. Was the lay off of the appellant from the position of HMO Project Director for just cause?

Subissue: Did the failure of respondent DHSS to offer the appellant, in lieu of layoff a transfer to a vacant position with a classification allocated to pay range 18 or 19 violate administrative and statutory guidelines or otherwise constitute an arbitrary and capricious action?

4. If the appellant was demoted or laid off without just cause, what is the appropriate remedy?

As agreed to by the parties at a prehearing conference held on February 26, 1986, the parties were provided a period of two weeks after the issuance of the Interim Decision to file any jurisdictional objections. In a letter dated August 1, 1986, respondent wrote:

This letter serves as the Department's objection to Issue 1. identified by you for hearing in the above referenced matters as set forth in the June 25, 1986, Interim Decision and Order. In addition this letter serves as the Department's motion to dismiss for lack of subject matter jurisdiction involving allegations that the personnel transaction affecting the Appellant, i.e. the movement of him from the position of Director of the Bureau of Social Security Disability insurance to the position of HMO/AFDC Project Director. The objection and motion is founded on the fact that the concept of "constructive demotion" does not exist in Wisconsin Civil Service Law.

The respondent's action of moving the appellant from the position of BSSDI Director to HMO Project Director was not denoted by the respondent as a "demotion". The question raised by respondent's motion is whether the action complained of by the appellant can, nevertheless, fit within the term "demotion".

The Commission's authority to hear appeals of disciplinary decisions is based on s. 230.44(1)(c), Stats., which provides:

(1) APPEALABLE ACTIONS AND STEPS. Except as provided in par. (e), the following are actions appealable to the commission under s. 230.45(1)(a):

* * *

(c) Demotion, layoff, suspension or discharge.

If an employe has permanent status in class, the employe 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.

In addition to reviewing these disciplinary actions identified as demotions, layoffs, suspensions, discharges and reductions in base pay, the Commission may review actions which have the same legal effect as an enumerated disciplinary action even though they may be denominated as something else.

Constructive discipline was discussed by the Commission in Mirandilla v. DVA, 82-189-PC (7/21/83):

The concept of personnel transactions which are considered "constructive" in nature is a familiar one in Wisconsin. The main area where this has been recognized is in the area of discharges. Even though statutes may only give administrative agencies jurisdiction over "discharges," this does not prevent the examination of a transaction facially denominated something other than a discharge to determine whether, in legal effect, it amounts to and should be considered a discharge.

For example, in Watkins v. Milwaukee County Civil Service Comm., 88 Wis.2d 411, 276 N.W. 2d 775 (1979), the Supreme Court dealt with the question of whether a resignation from civil service employment which was alleged to have been coerced was cognizable by the Milwaukee County Civil Service Commission under a statute providing for hearings on discharges, §63.10(1), Stats. Despite the fact that the statute makes no explicit reference to coerced resignations, the Court had no difficulty in concluding that they were covered by the statute:

Resignation obtained by coercion poses serious possibilities of abuse. "[A] separation by reason of a coerced resignation is, in substance, a discharge effected by adverse action of the employing agency." (Emphasis in original.) Dabney v. Freeman, 358 F2d 533, 535 (D.C. Cir. 1966). Treating coerced resignations as discharges for purposes of hearings under sec. 63.10, Stats., fits well with

the policies of security of tenure and impartial evaluation which underlie the civil service system. The strength of this policy is underscored by the language of sec. 63.04, Stats., which provides that "no person shall be ... removed from the classified service in any such county [which has adopted the civil service system], except in accordance with the provisions of said sections [secs. 63.01 to 63.16 inclusive]." 88 Wis. 2d at 420.

This type of approach was followed by this Commission in Evard v. DNR, 79-251-PC (2/19/80), and Petrus v. DHSS, 81-86-PC (12/3/81). The Commission's predecessor agency, the Personnel Board, in Juech v. Weaver, (1/13/72), determined that a transaction which had been denominated a reclassification was in legal effect a demotion, where the employer first removed all of the appellant's supervisory duties and subsequently reclassified his position from Maintenance Mechanic 2 to Maintenance Mechanic 1.

Respondent's motion is premised on the contention that the theory of constructive demotion advanced in this case extends beyond the definition of demotion that must be utilized. Respondent contends that unless the Commission finds that respondent's action falls within the definition of the term "demotion" found in s. ER-Pers 17.01, Wis. Adm. Code, the Commission cannot assert jurisdiction. That definition reads:

A demotion means the permanent appointment of an employe with permanent status in one class to a position, for which the employe is qualified to perform the work after customary orientation provided for newly hired workers in such positions, in a lower class than the highest position currently held in which the employe has permanent status in class. (Emphasis added.)

In his brief, respondent explains his argument as follows:

Classified employees can appeal a demotion, but that means only that they can appeal a movement to a position in a lower pay range.

* * *

The appellant alleges in his several appeals that the personnel transaction in question was a demotion because the HMO/AFDC Project Director position had less status, job security, authority, management responsibility and so forth. If these considerations are relevant at all, they are relevant only to the classification of the HMO/AFDC Project Director position. The HMO/AFDC Project Director position was classified as a Human Services Administrator 3 and was allocated to pay range 19, the same pay range as the Director of BSSDI. The Department

concedes that if the HMO/AFDC Project Director position was erroneously classified and should have been allocated to a pay range 18 or lower that the appellant would have been demoted. However, if the position was correctly allocated to pay range 19 and the appellant lost status, job security and so forth, he nevertheless was not demoted. In fact, if the HMO/AFDC Project Director position was correctly allocated to pay range 19, no matter how less pleasant or desirable the appellant found the new position, he was not demoted.

The Commission agrees with the respondent to the extent that a demotion does not occur unless the employe is assigned responsibilities that cause his (new) position to be classified at a lower level than the position he had held previously. However, in reaching this conclusion, the Commission is not dispensing with the concept of constructive demotion. That term simply means a personnel action that has the legal effect of a demotion even though the action is not denominated as such.

These conclusions are supported on several points. In Alexander v. State Personnel Board, Dane County Circuit Court 139-490 (1973), the court affirmed a decision by the Commission's predecessor, the State Personnel Board. The case arose from DNR's decision to move appellant from an office in Chicago to an office in Hudson, Wisconsin. Appellant contended the new assignment was a demotion, "not because of a change in civil service status or pay, but because he was being moved from what he considered a position of importance to a 'roadside stand'." The court wrote:

The ordinary English meaning of demotion is a lowering in grade. Wis. Adm. Code, Pers. 17.01 defines it as follows: "A demotion is the movement of an employee with permanent status from a position in a class to a position in another class that has a lower salary range maximum." Petitioner accepts neither definition because he says they are inconsistent with sec. 16.28, which reads: "(1)(a) An employee with permanent status in class may be x x x reduced in pay or position only for just cause." From this petitioner seeks to deduce that he was being reduced in position if he went to Hudson and hence it was a demotion. The respondent did not so view it, nor did the Department. Nor do we. While position may refer to location in one sense, we believe that, as used in the statute, it refers to the job and its character. The

statute, we think, requires that an employee be retained in his job classification and at his rate of pay, unless either is reduced for cause. It does not mean that he may not be moved from one office to another without any reduction in his civil services status or pay. Position, as the statute uses the word, means the kind of job, not the location of it. Since the work petitioner was to do at Hudson was of the kind he was doing in Chicago, promoting Wisconsin recreation and management of the office he was assigned to, there was no change of position. There was no change in civil service status or pay involved, so there was no demotion. Nor is the wording of Sec. 16.28 inconsistent with Wis. Adm. Code, Pers. 17.01, in our opinion.

The appellant apparently wishes to argue that even if his BSSDI Director and HMO Project Director positions were properly classified at the same or comparable classifications, he was demoted because his "salary advancement potential was limited in the latter job simply by its short term nature." If the appellant is permitted to interpret the term "demotion" so broadly as to include a reduction in salary advancement potential, then any program changes throughout state service will be reviewable by the Commission under the same theory. This result could clearly be inconsistent with the listing of specific personnel actions in s. 230.44(1), Stats., that are appealable to the Commission.

Here, the appellant's BSSDI position was apparently classified at the Human Services Administrator 3 (HSA 3) level and his HMO Project Director position was also classified at the HSA 3 level. The focus of the appellant's first three cases will be on whether appellant's HMO Project Director position was misclassified. In order to establish that the appellant was constructively demoted, the Commission will have to find that the HMO Project Director position should have been at a lower classification than HSA 3. That decision must be based on an analysis of the duties assigned to the position, the relevant class specifications, the classification factors and comparable positions.

In order to avoid possible confusion, it should be emphasized that a constructive demotion requires more than merely a movement of the affected employe to a position that is ultimately determined to have a lower classification than the employe's original position. There also must be an intent by the appointing authority to cause this result and to effectively discipline the employe. Certainly not every employe who is transferred into a position which ultimately may be downwardly reclassified has been subjected to a constructive demotion. This conclusion is supported by the foregoing authorities.

For example, in Petrus v. DHSS, Wis. Pers. Comm. No. 81-86-PC (12/3/81), the Commission stated:

"... the statute [§230.34(1) (am), Stats., resignation by job abandonment] is readily subject to abuse if invoked as retaliatory means of discipline. The likelihood of such abuse is magnified if no method of administrative review is provided.

* * *

Therefore, the Commission concludes that the legislature intended the Commission to have jurisdiction over involuntary resignations under s. 230.34(1)(am), Wis. Stats., just as the Supreme Court had construed s. 63.10, Wis. Stats. as granting the Milwaukee County Civil Service Commission jurisdiction over coerced resignations [Watkins v. Milwaukee Co. Civil Service Commission, 88 Wis. 2d 411, 420, 276 N.W. 2d 775 (1979)]. pp. 4-5.

In the Watkins case, the Court's holding was in the context of intentional disciplinary action imposed by the appointing authority:

"Resignation obtained by coercion [emphasis added] poses serious possibilities of abuse. '[A] separation by reason of a coerced [emphasis original] resignation is, in substance, a discharge effected by adverse action [emphasis added] of the employing agency.' ... Treating coerced resignations as discharges for purposes of hearings under sec. 63.10, Stats., fits well with the policies of security of tenure and impartial evaluation which underlie the civil service system...." 88 Wis. 2d at 420.

In Juech v. Weaver, Wis. Pers. Bd. (1/13/72), the Board observed:

"While all of the discussion between the parties was of 'reclassification', what the Respondent really had in mind and did was to 'demote' the Appellant in both pay and position." p.3.

The requirement of an intent by the appointing authority to effectuate discipline as an element of a constructive demotion also is consistent with Ch. ER-Pers. 17, Wisconsin Administrative Code, which governs demotions. Included among the "Exclusions", §ER-Pers. 17.02, is the following subsection:

"(3) The change in the classification of a position held by an employe with permanent status to a lower classification is a reallocation or reclassification under ch. ER-Pers. 3."

According to this rule, the actual change by reclassification or reallocation in the classification of a position to a lower classification is not a demotion. It would follow that not every action by an appointing authority which might precede a downward reclassification or reallocation, such as a transfer of an employe to a position, which, although in the same classification, is "weaker" from a classification standpoint, or a reorganization which results in the removal of some responsibilities of a position, should give rise to a constructive demotion. Only in a case where the appointing authority takes action which leads to a downward classification transaction, with the intent to discipline the employe, is there a constructive demotion.

Based on the above, the Commission enters the following:

ORDER

In order to reflect the above discussion as well as the fact that the change in appellant's duties was never denominated by the respondent as a demotion, the Commission makes the following modification to issue 1:

1. Was the appellant constructively demoted to the position of HMO Project Director?

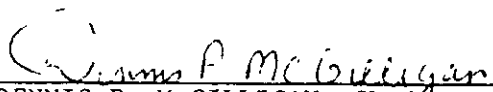
Subissue: What was the proper classification of the HMO Project Director position?

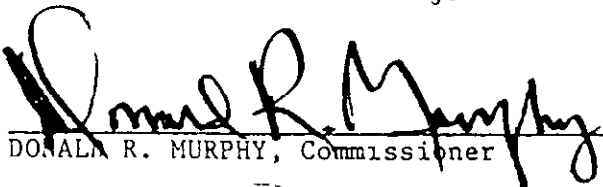
Subissue: Did the respondent intend to discipline the appellant in connection with the movement of appellant to the HMO Project Director position?


Otherwise, the respondent's motion is denied.

Dated: February 5, 1987

STATE PERSONNEL COMMISSION


DENNIS P. MCGILLIGAN, Chairperson


DONALD R. MURPHY, Commissioner


LAURIE R. McCALLUM, Commissioner

KMS:baj
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Parties

Robert Cohen
2617 Waunona Way
Madison, WI 53713

Tim Cullen
Secretary, DHSS
P. O. Box 7850
Madison, WI 53707

John Tries
Secretary, DER
P. O. Box 7855
Madison, WI 53707