

STATE OF WISCONSIN

PERSONNEL COMMISSION

**PETER D. STACY,**  
*Appellant,*

v.

**Secretary, DEPARTMENT OF  
CORRECTIONS,**

*Respondent.*

Case No. 98-0039-PC

**RULING ON MOTION  
TO DISMISS AND  
FINAL ORDER**

#### NATURE OF THE CASE

This case involves an appeal pursuant to §230.45(1)(c), Stats., of a noncontractual grievance. This matter is before the Commission on a motion to dismiss filed July 2, 1998. Both parties have filed briefs. Because of the relationship between this case and two previous appeals filed by appellant—97-0098-PC and 98-0006-PC—the procedural history of those cases will be summarized in the following Findings of Fact.

#### FINDINGS OF FACT

1. This appeal was filed on April 16, 1998. It concerns a noncontractual grievance filed by appellant.

2. The underlying transaction which precipitated this grievance is respondent's temporary reassignment of appellant from his position as superintendent of the St. Croix Correctional Center (SCCC) to the Hudson Community Corrections Office, effective September 8, 1997. Appellant filed an appeal (97-0098-PC) of this transaction with the Commission on October 8, 1997.

3. The Commission dismissed the aforesaid appeal (97-0098-PC) on February 19, 1998, for lack of subject matter jurisdiction. In that ruling, the Commission made the following findings of fact for the purpose of ruling on the motion:

1. The present appeal was filed on October 8, 1997. The facts asserted as forming the basis for the appeal are shown below:

Peter Stacy is the superintendent of the St. Croix Correctional Center in New Richmond, Wisconsin. In June of this year, over a period of two days, an intensive intervention took place, upon the decision of Mr. Stacy, after notification to the warden of the Wisconsin Correctional Center System (his supervisor's supervisor) and receiving his authorization to do so. Questions regarding the use of restraints on one inmate during the second day of the program (which were used pursuant to Department policy) were raised. Though initially investigated and a determination made that Mr. Stacy's actions did not constitute abuse of inmates as defined under Wisconsin Statute 940.29, another investigation is being conducted. Mr. Stacy has been re-assigned during the investigation.

The reason the appellant believes the action to be improper.

1. The appellant is not aware of any legal authority for reassignment under state law.
2. The appellant believes that such action was taken without just cause.
3. The appellant believes that the action was a violation of the appellant's rights of due process.
4. The appellant believes the action was inconsistent with past and current practices of the Department in similar situations.
5. The appellant believes the action is arbitrary and capricious.

2. The appeal is based on respondent's action described in a letter to appellant dated September 5, 1997, from Phil Kingston, Assistant Administrator of the Division of Community Corrections. (A copy of the referenced letter was attached to the appeal.) Mr. Kingston's letter stated as follows in pertinent part:

After review of the initial allegations made concerning inmate (LP), the decision has been made to conduct a more complete investigation into the matter. It is anticipated that this investigation will require a period of time to complete.

A decision has also been made that during the period of investigation, you are to be assigned to the Hudson Community

Corrections Office at 1920 Crestview Drive in Hudson, Wisconsin. You are to report to this work location at 7:45 a.m. on Monday, September 8, 1997. You will continue to report to Sandi Sweney while you are stationed at the Hudson Office. I will be discussing your work assignments with Ms. Sweney in the near future and these will be communicated to you on Monday, September 8, 1997.

3. Respondent is holding its own investigation in abeyance pending the outcome of a criminal investigation by the Eau Claire County District Attorney. (See DOC letter dated 12/12/97, and page 4 of appellant's brief dated January 6, 1998.)

4. It is undisputed that the "temporary" duties performed by appellant at the Hudson Community Corrections Office are below the level of duties from a classification standpoint than the duties he performed as Superintendent of the St. Croix Correctional Center. These "temporary" duties include developing a training guide for use in training officers when they transfer or are hired off a promotional list (Exh. F, attached to complainant's initial brief dated 1/6/98), reviewing current practices for management of offender risk and assessment and developing new strategies for case management (Exh. G, attached to complainant's initial brief dated 1/6/98).

5. Appellant retains his classification and all related benefits during the "temporary" reassignment to the Hudson Community Corrections Office. In a related vein, appellant made the following observation in the brief filed on February 17, 1998 (p. 5):

And now, seven months after the "incident", and five months after this "temporary duty assignment," there is still not a hint of the status of the criminal investigation or this, the second personnel investigation. And as for the substance, the first departmental investigation, conducted by Unit Supervisor Daniel Benzer, long ago concluded there was no violation of policy, there was nothing inherently complex, no facts to be discovered, nor anything novel or pertinent to add to the possible quantum of evidence available regarding anyone's conduct. The appellant quite legitimately asks how long he must wait to have his status as a civil servant determined. There are enough well publicized, seemingly interminable, investigations being conducted these days that the appellant's lack of confidence in expeditious resolution is understandable.

4. On the basis of these findings, the Commission concluded it had no jurisdiction over the appeal as a constructive demotion because of the temporary nature of the reassignment.<sup>1</sup>

5. Case No. 98-0006-PC involved an appeal of a noncontractual grievance<sup>2</sup> concerning the following subject matter (as stated in the grievance): “On 9/8/97 I was reassigned duties from Center Superintendent at SCCC to unspecified duties at the Hudson P&P office. This reassignment was w/o just cause and was arbitrary in nature. It was not consistent w/ past practice.”

6. The Commission dismissed the aforesaid appeal (98-0006-PC) for lack of subject matter jurisdiction on May 5, 1998. The Commission discussed the jurisdictional issue as follows:

Respondent first argues here that Grievance 2 can not be read to implicate a violation of subch. II, ch. 230, Stats., or the rules of the secretary promulgated under this subchapter, or a violation of written agency rules, policies, or procedures, as required by §ER 46.07, Wis. Adm. Code. The Commission agrees. Grievance 2 fails to specifically identify such an alleged abuse of discretion by respondent, nor can one be fairly implied. Consistent with the Commission’s decision in *Wing v. UW*, 78-137-PC, 4/19/79, the failure of the appellant to satisfy this requirement deprives the Commission of subject matter jurisdiction over these grievances.

Even if appellant had met this requirement of §ER 46.07, Wis. Adm. Code, Grievance 2 is deficient in another respect. Respondent argues in this regard that the assignment of duties is a management right. This is not only stated in §ER 46.04(2)(a), (c), and (d), Wis. Adm. Code, but relied upon by the Commission in *Miller v. DHSS*, 87-0209-PC, 2/3/89, in determining that it did not have subject matter jurisdiction over a grievance involving the assignment of duties to and the removal of duties from a position. Since the subject of Grievance 2 is the temporary assignment of duties to and removal of duties from appellant’s position, it is concluded that this involves a management right and, as a result, the

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<sup>1</sup> The Pierce County Circuit Court affirmed this decision and order on July 9, 1998, in Case No. 98CV53.

<sup>2</sup> There originally were two grievances. Appellant withdrew his appeal of the first grievance, so it is no longer relevant.

Commission does not have subject matter jurisdiction over this grievance. Appellant argues, however, that what is involved is not the assignment of duties to appellant's position but the imposition of discipline and since, "under ER 46.04(2)(f), it is an expressly conferred management right to take disciplinary action for just cause against an employee, [l]ogic dictates that this section also fairly implies that management rights do not include the right to take disciplinary action without just cause; . . . [and] any disciplinary action, whether for just cause or not, must, as stated in ER 46.03(1) 'affect his or her conditions of employment' and therefore be grievable." This is a strained reading of Chapter ER 46, Wis. Adm. Code. Furthermore, this code chapter provides that each of the disciplinary actions cognizable under the civil service code, i.e., oral reprimand, written reprimand, demotion, suspension, discharge, removal, layoff, or reduction in base pay, are not grievable. §§ER 46.03(2)(c) and (h), 46.07(1)(a), Wis. Adm. Code. To permit an employee to circumvent this clear intent not to include the enumerated disciplinary actions within the scope of the grievance process for unrepresented employees simply by attaching to the action he is attempting to grieve a label not included in this list would frustrate the spirit of these code provisions. It is apparent, in view of appellant's argument that his temporary reassignment is to a position with lower level duties, that he is essentially claiming that he has been constructively demoted. Pursuant to §ER 46.03(2)(c), Wis. Adm. Code, neither an actual or constructive demotion would be grievable. As a result, it is concluded that the Commission lacks subject matter jurisdiction over Grievance 2.

7. In the current appeal (98-0039-PC), appellant alleges as follows, *inter alia*:

On 2/17/98 Ken Kissinger, while conducting a third step grievance on another matter, stated that he had, in his capacity as Employment Relation's [sic] Chief for the Dept. of Corrections (DOC), been asked by the DOC to review the "parameters" of the letter dated 9/5/97 reassigning me to the Hudson probation and parole office. The letter, authored by Ass't. Admin. P. Kingston, acting in his capacity as the appointing authority's designee as defined under 46.06(2), was a directive reassigning me from my position as Superintendent at St. Croix Correctional Center (SCCC) to an unspecified position at the probation office in Hudson, WI. When asked, by me, what the intent of the letter was, K. Kissinger stated that it was disciplinary in its intent. . . .

### CONCLUSIONS OF LAW

1. The Commission lacks jurisdiction over the subject matter of this appeal.
2. This appeal must be dismissed.

### OPINION

It is clear from the above recitation of the history of appellant's earlier cases that this appeal essentially is another attempt by appellant to establish subject matter jurisdiction over appellant's September 8, 1997, temporary reassignment from SCCC to the Hudson Probation and Parole office. As respondent points out in his brief on this motion, there are only two things that differentiate this appeal from the two earlier appeals: first, the alleged statement by Mr. Kissinger,<sup>3</sup> and second, a longer period of time has elapsed since appellant's reassignment to Hudson. The issue is whether either of these two changes in the factual setting of this case leads to a different result than in appellant's earlier two appeals.

As to Mr. Kissinger's statement, regardless of which version (appellant's or respondent's) is utilized, it would not lead to a different result. If he had characterized the transfer as disciplinary in nature, and as exceeding in duration the DOC policy on the maximum length of temporary reassignments, this presumably would support appellant's argument that the transaction should be considered a constructive demotion. However, the Commission has no jurisdiction of an appeal of a noncontractual grievance involving a demotion, actual or constructive. *See* §§ER 46.03(2)(c), 46.04(2)(f), Wis. Adm. Code. This leads to the related question of whether Kissinger's statement could open the door to an appeal, pursuant to §230.44(1)(c), Stats., of a constructive demotion.

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<sup>3</sup> Respondent denies that Kissinger made the statement that appellant alleges. According to respondent, Kissinger did say that "unions would characterize any involuntary reassignment as disciplinary and would grieve it accordingly. [He] also stated that if a reassignment were to be permanent or to last a long time (more than six months) and was based on an employee's poor work performance or misconduct, it would become disciplinary." Kissinger affidavit, p. 2.

In appellant's initial appeal (No.97-0098-PC), the Commission addressed the question of whether it had subject matter jurisdiction over appellant's September, 1997, reassignment from SCCC to the Hudson Probation and Parole office. The precedent in this area, particularly *Cohen v. DHSS*, 84-0072-PC, 2/5/87, establishes that a constructive demotion requires a permanent reassignment from one position to another position which has duties and responsibilities of a lower classification, with the intent by the employing agency to effectively discipline the employe. The Commission's February 19, 1998, decision in Case No. 97-0098-PC includes the following:

The main question raised in Mr. Stacy's appeal is whether a constructive demotion can be said to exist based on a "temporary" change in duties at a lower level from a classification standpoint, a change which has been in effect since September 8, 1997, pending resolution of a criminal investigation to be followed by respondent's second investigation when such "temporary" reassignment has had no impact on Mr. Stacy's current classification or wage. The Commission answers this question in the negative. While the concept of *constructive demotion* requires some leeway or deviation from the definition of demotion recited previously from the administrative code, the Commission never has found that a constructive demotion exists without a permanent change in job duties.

Mr. Stacy felt disadvantaged regarding the current briefing schedule because DOC has complied with some of Mr. Stacy's discovery requests but not those which go to the question of whether respondent's "temporary" reassignment was taken with disciplinary intent. As noted in *Davis*, one element of establishing a constructive demotion is to show the employer intended to discipline the employe. However, in the instant case there appears to be no real dispute that appellant's reassignment was made on a temporary basis pending investigation of the alleged abuse of an inmate, albeit appellant complains about the length of time the investigation has been taking. Accordingly, the issue of disciplinary intent is moot. (footnote omitted) Page 7.<sup>4</sup>

Applying this approach to the instant case, the issue of disciplinary intent is moot unless the first element of a constructive demotion—a permanent reassignment to another position—is present. To the extent Mr. Kissinger's statement runs to the issue

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<sup>4</sup> This decision was affirmed by the Pierce County Circuit Court in *Stacy v. State of Wisconsin Personnel Commission*, Case No. 98CV53, July 9, 1998.

of intent, the presence of his statement cannot result in a different result than was reached in Case No. 97-0098-PC. The significance of Mr. Kissinger's statement to the issue of whether a "temporary" reassignment of the length which has occurred here—eight or nine months—should be considered permanent due to the passage of time will be discussed below.

The other circumstance which has changed since the February 19, 1998, dismissal of Case No. 97-0098-PC is the passage of an additional eight or nine months while appellant's nominal status—temporarily reassigned pending investigation of the June 1997 incident which occurred at SCCC—remains unchanged. Appellant contends that at some point, what is ostensibly a temporary reassignment becomes constructively permanent: "the passage of that amount of time should mandate the questioning [of] the Respondent's characterization of Mr. Stacy's reassignment as a 'temporary duty assignment.'" Appellant's brief, p.2.

The Commission has recognized that under certain circumstances in the classified civil service a nominally temporary assignment may become permanent after the passage of a significant amount of time. For example, *Fredisdorf v. DP*, 80-0300-PC, 3/19/82, involved a classification issue. Normally, the classification of a position is based on its permanently assigned duties. The incumbent in *Fredisdorf* was seeking reclassification of his position on the basis of certain duties which he had been performing for a number of years. The respondent argued these duties were not permanent in nature, and thus could not be the basis for a reclassification. The Commission held: "while . . . as a general proposition positions are not reclassified on the basis of 'temporary' job changes, there comes a point after duties have been in place for a number of years and the timing of future changes cannot be predicted with any degree of certainty, that the changes cannot be considered 'temporary.' In this case that point has been reached." P. 8. To the extent that this principle in *Fredisdorf*, which involved a classification issue, can be applied to the instant case, which involves an issue of constructive discipline, the latter involves a reassignment which has lasted



less than a year while the former involved duties that had been assigned for several years.

Returning to Mr. Kissinger's statement, respondent's version includes the following: "Unions would characterize any involuntary reassignment as disciplinary and would grieve it accordingly. I also stated that if a reassignment were to be permanent or to last a long time (more than six months)<sup>5</sup> and was based on an employee's poor work performance or misconduct, it would become disciplinary." This is a statement about employees covered by a collective bargaining agreement, which complainant is not. The most closely related provision from the civil service code is contained in Ch. ER-MRS 32, Wis. Adm. Code, Acting Assignments. Section ER-MRS 32.01 provides: "*When a position is vacant* and the needs of the service require the performance of the duties of that position, a permanent employe may be temporarily assigned to perform those duties." (emphasis added) This chapter does not apply to the transaction in question because appellant was not assigned to fill the duties associated with a vacant position.

In conclusion, the differences in appellant's situation since the Commission's earlier decisions—the passage of several more months and Mr. Kissinger's statement—do not lead to a different result. Essentially, what appellant has been trying to appeal to the Commission in all three cases is his temporary reassignment from SCCC to Hudson, while retaining his classification level and attendant salary, pending investigation of the incident which occurred at SCCC in June 1997. This Commission does not have the statutory authority to hear an appeal of such a reassignment. The appellant obviously believes management has not handled his situation fairly. He may or may not be correct in this belief, but this Commission does not have the authority to make that determination.

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<sup>5</sup> Appellant's version does not include reference to the length of a temporary reassignment.

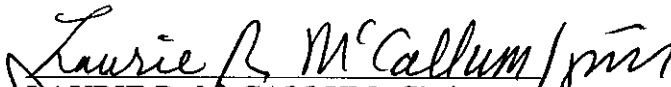
ORDER


This appeal is dismissed for lack of subject matter jurisdiction.

Dated: August 26, 1998.

STATE PERSONNEL COMMISSION

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LAURIE R. MCGALLUM, Chairperson

  
DONALD R. MURPHY, Commissioner

  
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NOTICE

OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW  
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

**Petition for Rehearing.** Any person aggrieved by a final order (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

**Petition for Judicial Review.** Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of

any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.

2/3/95