

**EDWARD SHELBY,**  
*Appellant,*

v.

**President, UNIVERSITY OF WISCONSIN  
SYSTEM,  
Administrator, DIVISION OF MERIT  
RECRUITMENT AND SELECTION, and  
Secretary, DEPARTMENT OF  
EMPLOYMENT RELATIONS,  
*Respondents.***

**RULING  
ON  
MOTIONS**

Case No. 02-0012-PC

This matter is before the Commission on the motions of respondents to dismiss the appeal for lack of subject matter jurisdiction. The parties have filed written arguments with supporting documentation. The following facts appear to be undisputed.

#### FINDINGS OF FACT

1. Since he was hired in March of 1999, the appellant has been employed in the Department of Physical Plant Services of the University of Wisconsin-Milwaukee (UWM) at the Custodian 2 classification level. Appellant's position is covered by a collective bargaining agreement.

2. Appellant has worked in a variety of Custodian 2 assignments while employed at UWM.

3. Respondent Department of Employment Relations (DER) maintains classifications for Custodian 1, 2 and 3, but has never created a separate classification for Custodian 2-Lamper or Custodian Lamper.

4. Until January of 2002, the appellant's position description included the following information:

**POSITION SUMMARY**

Basic function is to provide custodial services (general cleaning and maintenance) in offices, classrooms, restrooms, and all similar areas on the University campus.

**GOALS**

- 60% A. Clean all areas inside University Buildings
- 20% B. Maintain related receptacles, dispensers, and equipment
- 15% C. Perform scheduled maintenance on all floors inside University Buildings
- 5% D. Entrance ways

5. On January 3, 2002, appellant filed a first step contractual grievance that stated, in part:

Ms. Shelby is a 100% time Custodian 2 - Lamper in the UWM Library. On a regular basis he is ordered to carry out Lamping and Custodian work in area assignments which are left vacant, unstaffed, and/or under staffed by the employer in other university buildings in addition to his 100% time appointment.

On January 25, 2002, appellant amended his grievance. The amendment stated, in part:

2. The employer does not have a position description for the "Lamper" title. The employer did not provide Mr. Shelby with a position description for his job as a "lamper" in the UWM Library.

6. In its January 28<sup>th</sup> decision at the first step of the grievance, the employer denied that a contract violation existed and noted: "Due to [appellant's] request, we will generate an updated Lamper position description for him."

7. The UWM's Department of Physical Plant Services prepared a new position description and one of appellant's supervisors signed it on January 29, 2002. The 2002 position description reads, in part:

**POSITION SUMMARY**

Basic function is to maintain lighting and clean lamp fixtures inside University buildings. This position also provides custodial services (general cleaning and maintenance) in offices, classrooms, restrooms, and all similar areas on the University campus.

**GOALS**

- 50% A. Maintain lighting inside University Buildings

- 15% B. Clean all areas inside University Buildings
- 15% C. Maintain related receptacles, dispensers, and equipment
- 15% D. Perform scheduled maintenance on all floors inside University Buildings.
- 5% E. Entrance ways

Appellant refused to sign this position description.

8. In approximately February of 2002, the Department of Physical Plant Services sent updated and identical position descriptions for 4 Custodian 2s (appellant, Robert Hein, Kent Wilbur and Robert Wahl) to UWM's Department of Human Resources. The duties reflected in these four position descriptions were those set forth in Finding 7. Susan Dawicke, a Human Resources Assistant, reviewed the updated position descriptions to ensure that the classification of Custodian 2 remained appropriate. Ms. Dawicke concluded that the Custodian 2 classification remained appropriate for the 4 positions and on March 4, 2002, she notified the Administrative Officer for the Division of Administrative Affairs that the position descriptions had been updated.

9. On February 27, 2002, the Personnel Commission received a letter of appeal from the appellant that stated, in part, as follows:

The respondent, UWM, and named individuals through illegal action or abuse of discretion violated the following specifications: 230.09 Wis. Stats., ER 2 and ER 3 of the Wisconsin Administrative Code. January 29 and February 1, 2002, without following the requirements of the laws and regulations and without authority, Butzlaff and Shaw invented a position description for the Custodian – Lamper title.

10. By letter dated February 28, 2002, the Commission asked the appellant to clarify his appeal:

Only certain types of personnel actions may be appealed to the Commission. While it is not entirely clear, it appears that you are seeking to appeal the action of using certain language in the position description for Mr. Shelby's position.

If the appeal is being filed under §§230.44(1)(a) or (b), Stats., or §§230.45(1)(c) or (e), there is a \$50 filing fee. The Commission's rules relating to the filing fee are found in ch. PC 3, Wis. Adm. Code. A copy of those rules is attached.

You are provided 30 calendar days from the date of this letter to specify whether you are filing the appeal under §§230.44(1)(a) or (b), Stats., or §§230.45(1)(c) or (e), (rather than some other provision in §§230.44 or .45), and, if so, to supply the filing fee in the manner specified in the Commission's rules.

11. On March 25, 2002, appellant responded to the Commission's February 28<sup>th</sup> letter and explained:

Mr. Shelby's appeal is under s. 230.44(1)(d), *Illegal action or abuse of discretion*. Nonetheless, to ensure Mr. Shelby's right to appeal endures in case the Commission decides it is properly under s. 230.44(1)(a), a money order for the sum of \$50.00 is enclosed for the filing fee.

12. By letter dated May 29, 2002, and in response to a letter from a member of the Commission's seeking further clarification of the allegations, appellant wrote:

The gravamen of the appeal is as follows: Line supervisors at UW-Milwaukee created a new position without review or action by [the Division of Merit Recruitment or Selection] or the [Department of Employment Relations], or even the Human Resources department at UW-Milwaukee. The Custodial 2-Lamper position is not a "best fit" with existing classification structure. UW-Milwaukee placed the appellant in this new position thereby constituting a "hire" and such "hire" was a demotion. The duties of the new position are unique to the appellant, and differ substantially from his previous Custodian 2 position, and all other Custodial-2 position descriptions at UW-Milwaukee.

#### CONCLUSION OF LAW

The Commission lacks subject matter jurisdiction over this appeal.

#### OPINION

The Personnel Commission's authority to hear appeals from certain personnel actions is based on language found in §230.44 and .45, Stats. In his response to respondent's motion, appellant contends the Commission has the authority to hear this matter under the following provisions in §230.44(1), Stats..

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

(a) *Decision made or delegated by administrator*. Appeal of a personnel decision under this subchapter made by the administrator or by an appoint-

ing authority under authority delegated by the administrator under s. 230.05(2).

(b) *Decision made or delegated by secretary.* Appeal of a personnel decision under s. 230.09(2)(a) or (d) or 230.13(1) made by the secretary or by an appointing authority under authority delegated by the secretary under 230.04(1m).

(c) *Demotion, layoff, suspension or discharge.* If an employee has permanent status in class, or an employee has served with the state as an assistant district attorney for a continuous period of 12 months or more, the employee may appeal a demotion, layoff, suspension, discharge or reduction in base pay to the commission, if the appeal alleges that the decision was not based on just cause.

(d) *Illegal action or abuse of discretion.* A personnel action after certification which is related to the hiring process in the classified service and which is alleged to be illegal or an abuse of discretion may be appealed to the commission.

The question raised by the motion to dismiss is whether the action of assigning certain duties to the appellant or documenting duties by preparing a particular position description fits within any of the statutory categories of appealable actions. This action is attributable to the University of Wisconsin, as the appointing authority, rather than to either the Administrator of the Division of Merit Recruitment and Selection (DMRS), or the Secretary of the Department of Employment Relations (DER).

The reference to "administrator" in §230.44(1)(a) is to the Administrator of DMRS. Sec. 230.03(1), Stats. The reference to "secretary" in §230.44(1)(b) is to the Secretary of DER. Sec. 230.03(13), Stats. Sections 230.44(1)(c) and (d), describe certain actions that are attributable to the appointing authority for the agency that employs the employee in question or contains the position that is being filled.

The duties of the Administrator of DMRS, of the Secretary of DER and of appointing authorities are described in §§230.05, .04, and .06, respectively. Pursuant to §230.06(1)(b), an appointing authority has the power to

Appoint persons to or remove persons from the classified service, discipline employees, *designate their titles, assign their duties* and fix their compensation, all subject to this subchapter and the rules prescribed thereunder. (Emphasis added.)

The action being appealed in the present case fits within the scope of assigning duties and designating titles.

The Commission has previously ruled that it generally lacks the authority to review a decision by an employer to assign duties to a particular position. *Rich v. State Pers. Board*, Dane County Circuit Court, 159-084, 12/23/80; *Asche v. DOC*, 90-0159-PC, 5/21/97; *Kienbaum v. UW*, 79-246-PC, 4/25/80. Under limited circumstances, if the duties have been assigned to the position for disciplinary purposes so that the employee is constructively demoted, the action of the appointing authority can be reviewed by the Commission under §230.44(1)(c), Stats., as long as the employee has permanent status in class. In order to prevail, the employee must establish not only that changes in assigned duties and responsibilities imposed by management reduced the effective classification of the position, but also that the appointing authority had the intent to cause this result and to effectively discipline the employee. *Davis v. ECB*, 91-0214-PC, 6/12/92. But if the position is covered by a collective bargaining agreement, the Commission's jurisdiction is superseded by the contract. *Krueger v. DHSS*, 92-0068-PC-ER, 7/23/96; *Wolfe v. UW (Stevens Point)*, 85-0049-PC, 9/26/85; *Swenson v. DATCP*, 893-0152-PC, 1/4/84, petition for rehearing denied, 2/17/84; *Matulle v. UW*, 81-433-PC, 1/27, 82, affirmed by Winnebago County Circuit Court, *Matulle v. State Pers. Com.*, 82-CV-207, 11/19/82; *Lott v. DHSS & DP*, 79-160-PC, 3/24/80. Here, it is undisputed that the appellant's position is covered by a collective bargaining agreement. Therefore, pursuant to §§111.93(3) and 230.34(1)(ar), Stats., he is precluded from appealing any action under §230.44(1)(c), Stats.

It is also clear that UWM's actions are not related to the hiring process, so this matter does not satisfy the requirements for an appeal that is filed under §230.44(1)(d), Stats.

As noted above, the Commission has authority under §230.44(1)(b), Stats., to review certain decisions attributable to the Secretary of DER, or delegated by the Secretary to the appointing authority. The three categories of such decisions that are appealable are decisions "under s. 230.09(2)(a) or (d) or 230.13(1)." The last of these

three provisions relates to requests for records of certain personnel matters and is clearly inapplicable to the present case. Sections 230.09(2)(a) and (d) describe the decisions to initially allocate a position to a certain classification, to reclassify and reallocate positions, and to either regrade the incumbent or to open the position to other applicants. The original allocation decision is described in §ER 3.02, Wis. Adm. Code, as follows:

- (1) After an appointing authority has received budgetary approval for a new position and desires to fill the position, a written description of the position's duties and responsibilities and any other pertinent information as required shall be submitted to the secretary.
- (2) The secretary shall then allocate the position under s. 230.09(2)(a), Stats.

In the present case, the action of Ms. Delwicke was not to initially allocate a new position but to determine whether the duties described in the revised position description were consistent with the previous classification of Custodian 2. There was no reallocation, as defined in §ER 3.01(2), and no reclassification, as defined in §ER 3.01(3), because the position was not assigned to a *different* class. Therefore, the Commission has no jurisdiction over this matter under §230.44(1)(b), Stats.

The Commission's conclusion that it lacks subject matter jurisdiction over this appeal does not bar the appellant from requesting a formal review of the proper classification of his position and ultimately appealing the decision with respect to that request pursuant to 230.44(1)(b), Stats., in the event the appellant is adversely affected by the decision.

In his submission dated July 9, 2002, the appellant stated, in part:

6. In Ms. Dawick's affidavit, paragraph 9, she states: "The procedure I followed in reviewing the changes made to Mr. Shelby's Position Description was consistent with UWM's normal policies and procedures." Taking Ms. Dawicke's statement as accurate entails that UWM's human resources department only reviews position descriptions when the employee in question files an appeal with the Personnel Commission. Note that human resources signed exhibit O – the Custodian 2-Lamper position description – March 4, 2002, which was six days after the Personnel Commission received this appeal – February 26, 2002. This discrepancy ought to raise serious questions about the credibility of

the affidavit and its attachments, and indeed the genuineness of UWM's entire position. If nothing else, these documents support the appellant's contention that low level supervisors invented the Lamper position when the appellant's grievance representative pointed out that they had assigned the appellant at more than 100%. To cover-up its improper conduct, UWM backtracked its paperwork, but only after Mr Shelby filed the instant appeal. These actions by UWM present grounds for this appeal.

The complainant's characterization of UWM's conduct as "backtracking" is without support. Ms. Dawicke's analysis of the position description previously prepared by the Department of Physical Plant Services was entirely consistent with the following statement in her affidavit dated June 17, 2002: "Whenever I receive updated Position Descriptions for departments at UWM, I review them to ensure that the classification remains appropriate." The only other position description that was submitted by the parties in this matter reflects a gap of nearly 8 months from the time the position description was signed by the first-line supervisor to the time it was signed by the personnel manager.

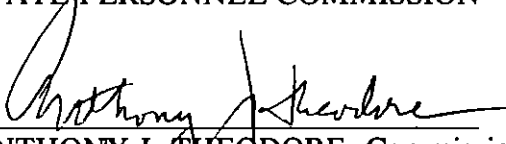



ORDER

This matter is dismissed for lack of subject matter jurisdiction.

Dated: July 31, 2002 STATE PERSONNEL COMMISSION

KMS:020012Arull

  
ANTHONY J. THEODORE, Commissioner  
  
KELLI S. THOMPSON, 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