

LYNN WALTERS*Appellant,*

v.

**Secretary, DEPARTMENT OF CORREC-
TIONS***Respondent.*

Case No. 02-0014-PC

**RULING ON MOTION
TO DISMISS FOR LACK
OF JURISDICTION**

This matter is before the Commission on Respondent's motion to dismiss for lack of jurisdiction. Both parties have filed briefs. The following facts appear to be undisputed, and are made solely for the purpose of deciding this motion.

FINDINGS OF FACT

1. Appellant has been employed by respondent DOC in the Division of Juvenile Corrections (DJC) (previously known as the Division of Youth Services) since March 21, 1995.

2. In 2001 the classification of appellant's position was changed from Program Assistant-4-Confidential to Program Assistant-Advanced-Confidential (PAAC) as the result of a change in the relevant class specifications.

3. This appeal was filed on March 7, 2002. It alleges, among other things, that on February 6, 2002, her supervisor gave appellant a new position description that incorporated a change in appellant's position from paraprofessional or professional level to entry-level clerical.

4. Effective March 10, 2002, appellant's position was reclassified or reallocated¹ from PAAC in Pay Range (PR) 81-05 to Program Assistant 4 (PA 4) in PR 2-11.

¹ Neither party indicates which of these classification actions occurred in connection with the March 10, 2002, change in classification. However, it does not affect the outcome of this ruling.

5. PR 81-05 and PR 2-11 are counterpart pay ranges. The reclassification of appellant's position effective March 10, 2002, did not result in any change in either appellant's salary or her pay range.

OPINION

Appellant contends that the personnel transaction here in question was a constructive demotion cognizable under s.230.44(1)(c), Stats., which provides for appeals to the Commission of certain disciplinary actions including demotions. In order for appellant to establish a constructive demotion, she must show she has been assigned responsibilities that cause her changed position to be effectively classified at a lower level than the position was prior to the changes, and that the employer/appointing authority acted with the intent to cause this result and to effectively discipline her. *Davis v. ECB*, 91-0214-PC, 5/14/92; *see also Cohen v. DHSS*, 84-0072-PC, 2/5/87.

In support of the motion to dismiss, respondent contends that both the PAAC classification and the PA 4 classifications are paraprofessional positions, and the reason for the change in classifications is because appellant ceased performing the "confidential" aspect of the former classification. As noted above in Findings 4 and 5, the two classifications are in counterpart pay ranges and therefore the personnel transaction had no financial impact on appellant. Pursuant to *Davis* and *Cohen*, in order to establish a constructive demotion, appellant would have to show that the reconfigured position is actually at a lower classification level than it was prior to the changes, notwithstanding that the classification transaction on its face resulted in the position nominally being at an equivalent classification level.

In her brief in response to respondent's motion, appellant contends that the motion "is entitled Motion to Dismiss for Lack of Jurisdiction, [but] it is more like a motion for summary judgment." She then presents two arguments to support her theory that her appeal involves a cognizable constructive demotion.

Appellant contends she requested a reclassification of her position in July 2000 that was turned down due to improper pressure on the DOC personnel bureau (BPHR) exerted by Administrator Eurial Jordan.² She goes on from there to argue that

If DJC Management had not inappropriately interfered with the reclass appeal by exerting influence over BPHR and presenting spurious information concerning Appellant to BPHR, the reclass would have been granted and the constructive demotion would have been an actual demotionIf BPHR had made its decision based on appropriate facts, it would have granted appellant's request for reclass and Appellant's classification would have been a Corrections Administrative Specialist and, therefore, when DJC Management changed Appellant's duties to fit a Program Assistant 4, it would have been an actual demotion. Appellant's Reply Brief filed January 3, 2003, pp. 2, 3..

This argument is not persuasive for two reasons.

Even assuming, for the sake of discussion, that appellant should have received a reclassification to a higher level in 2000, a change to a lower level brought about as a result of a downward reclassification or reallocation does not fit the definition of a demotion. Section ER-MRS 1.02(5), Wis. Adm. Code, defines a demotion as "the permanent appointment of an employee with permanent status in one class to a position in a lower class than the highest position currently held in which the employee has permanent status in class, unless excluded under s. ER-MRS 17.02. [Exclusions]" Laying to one side the fact that there is no appointment from one position to another in the instant case,³ s. ER-MRS 17.02(3) provides as an exclusion from the concept of demotion that "[t]he change in classification of a position held by an employee with permanent status to a lower classification is a reallocation or reclassification under ch. ER 3." Furthermore, in the Commission's opinion, the chain of causation on which appellant relies is too convoluted to fall within some other theory of constructive demotion.

Appellant's next argument is that:

² This reclass denial was appealed to this Commission and is pending as Case No. 02-0011-PC.

³ This would not be fatal to the transaction constituting a constructive demotion if it satisfied the criteria therefor.

[T]he underlying allegations provide sufficient basis for the Commission to have subject matter jurisdiction in this case as the Complaint alleges that complainant's "constructive" demotion was intended to punish/discipline Appellant and the demotion is "constructive" as it involves a significant reduction in the level of responsibility, decision making authority, duties, title and rank within the organization where Complainant works. See Attachments A, B and C⁴ to Appellant's Complaint. *Id.*, p. 4.

Assuming for the sake of discussion that appellant's position was reduced in level of responsibility, etc., it does not constitute a constructive demotion unless it has been reduced to the level of a lower classification. As a PA 4, the position is in the same pay range as previously, and it is not in a lower classification. Appellant has not even alleged that its effective classification level is lower than it was, no less any indication of what that lower classification might be. Therefore, on the basis of the undisputed facts, appellant has not suffered a constructive demotion which would provide a jurisdictional basis for this appeal pursuant to s. 230.44(1)(c), Stats.

The respondent also argues that if appellant were constructively demoted, her remedy would be under the collective bargaining agreement, and s. 111.93(3), Stats., would bar jurisdiction. However, since appellant was in an unrepresented position when her classification was changed from PAAC to PA 4, s. 111.93(3) would not apply because at the time she lost the confidential classification, she was not subject to the contract.

⁴ Attachment A is appellant's PA4 PD (position description) dated February 2002, Attachment B is appellant's PA4 Confidential PD dated July 2000, and Attachment C is a February 7, 2002, memo to appellant and two other employees concerning revisions in a case management manual chapter.

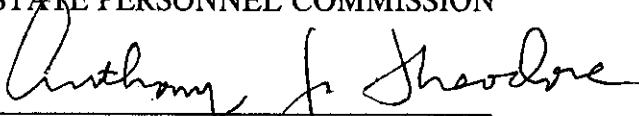
CONCLUSIONS OF LAW

On the basis of the undisputed facts, the appellant has failed to state a viable claim under s. 230.44(1)(c), Stats.

ORDER

This appeal is dismissed for failure to state a cognizable claim.

Dated: April 2, 2003. STATE PERSONNEL COMMISSION


ANTHONY J. THEODORE, Commissioner
(Commissioner Theodore is the sole sitting commissioner; the other two commissioner positions are vacant. Therefore, Commissioner Theodore is exercising the authority of the Commission. See 68 Op. Atty. Gen. 323 [1979]).

AJT:020014Arul2

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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