

ANN MARIE KRUEGER*Appellant,*

v.

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

Case No. 02-0045-PC

**RULING ON MOTION
TO DISMISS****NATURE OF THE CASE**

This case involves an appeal filed September 4, 2002. In her appeal letter, appellant states that she was offered a transfer to DCI (Dodge Correctional Institution) after having received an at-risk letter for layoff effective September 7, 2002, while she was a TCI (Taycheedah Correctional Institution) unit manager. She states: "My appeal is to challenge the transaction of personnel in its decision not to grant discretionary or parity due to the layoff." On October 17, 2002, respondent filed a motion to dismiss on jurisdictional grounds. Both parties have filed briefs through counsel.¹ The following findings of fact are based on material submitted by the parties and appear to be undisputed. The commission makes these findings solely for the purpose of resolving this motion.

FINDINGS OF FACT

1. At all relevant times, appellant has been employed by DOC in an unrepresented position in the classified civil service with permanent status in class.

¹ The commission regrets the amount of time it has taken to issue this decision. In connection with the state's ongoing budget difficulties, the commission has been understaffed in its professional positions by 20% since May 2000, 40% since February 2002, and 60% since January 2003. In addition, the commission has had to relocate its offices and deal with many matters relating to the impending demise of the commission on July 1, 2003, pursuant to the budget bill, SB 44, s. 9139. These factors have contributed to the delay.

2. Respondent appointed appellant as a Corrections Unit Supervisor at TCI effective August 26, 2001. Appellant had previously been employed at RCI (Racine Correctional Institution). Complainant's rate of pay remained at \$22.159 following this appointment.

3. On July 22, 2002, appellant received an "at risk" notice of layoff from TCI, with an effective date of September 7, 2002.

4. On August 22, 2002, appellant was interviewed at DCI for a Corrections Unit Supervisor position. The same day, appellant accepted a transfer to a Corrections Unit Supervisor position at DCI.

5. Also on August 22, 2002, appellant requested parity pay of as much as \$3.00/hour to make up for a reinstatement decision she made in 1996, and for parity with other unit managers with similar years of seniority and time in grade.

6. On August 23, 2002, DCI Deputy Warden Mark K. Heise informed appellant that she would not receive a pay increase because it was not respondent's normal practice to grant pay increases for lateral movement to a position in the same classification with the similar scope of duties and responsibilities.

7. In a September 4, 2002, letter, DCI Warden John Bett confirmed appellant's transfer to DCI, advised her that her salary would remain at its current level of \$22.603/hour, and that any further pay adjustments would be in accordance with the State Compensation Plan.

8. On September 4, 2002, appellant filed this appeal, which includes the following:

On July 22, 2002, I received an at risk letter for layoff effective September 7 as TCI Unit Manager. I have since then interviewed and was offered a transfer to DCI as a Unit Manager.

My appeal is to challenge the transaction of personnel in its decision not to grant discretionary or parity due to the layoff. I have been a Unit Manager for 5 years. I accepted transfer to DCI and was denied discretionary consideration. Enclosed is an open record request that

shows that my salary is considerably lower than that of newer unit managers with less seniority.²

While at RCI, I requested parity for the inequity of salary as well as the unique job duties. During that time I had three times the staff and responsibility of other unit managers at RCI . . . I decided to stay with my job, hoping parity would be forthcoming with opening the TCI new units or upon transfer. Neither occurred.

9. Attached to appellant's letter of appeal filed September 4, 2002, are copies of two memoranda from appellant to RCI Warden Ken Morgan. These memoranda include the following:

a) A memorandum to the warden dated March 10, 2000, includes the following:

On Thursday, January 14, 1999, I requested a pay adjustment. The Assistant Unit Managers, whom I supervise, were upgraded to a pay-range 15 and then was [sic] paid 52 cents per hour greater than my hourly pay. Gene discussed the issue of providing equity later in the fiscal year when we would know the size of the budget. Upon follow up on July 7, 1999, Gene thought there might be a performance recognition in April or May. On February 28, 2000, I received the notice of broadband pay schedules. I discussed this schedule with Sanger Powers, Bureau of Personnel and Human Resources. He stated that there would be discretionary compensation for each institution to decide increases based on unique positions. The institutions were to know there [sic] limits allowed by April first. I will be on vacation for the rest of March. I would like to ensure your understanding that the Dane Unit has, not only, inequity in the salaries of supervisor to employee, but also, Dane is unique to its job duties and supervisory responsibly [sic].

* * *

I hope this gives you a summary of my worth when deciding discretionary pay increases.

b) A memorandum to the warden dated November 22, 2000, includes the following:

² The document referred to here, which was filed with appellant's appeal letter on September 4, 2002, compares appellant's salary rate with other unit managers in DOC.

This request is similar to my first on Thursday January 14, 1999. I have since requested every six months, reconsideration for a parity adjustment based on Dane Unit's unique responsibilities. The Assistant Unit Managers, whom I supervise, were upgraded to a payrange 15. New Unit Managers receive a higher pay or very close to mine when I have been in the position for four years.

* * *

I hope this gives you a summary of my worth when deciding discretionary pay increases.

CONCLUSIONS OF LAW

1. The commission has jurisdiction over this appeal pursuant to s. 230.44(1)(d), Stats.
2. Respondent's decision to not grant appellant her requested salary adjustment of up to \$3.00/hour on the occasion of her transfer from TCI to DCI was correct as a matter of law in accordance with s. ER 29.03(5), Wis. Adm. Code.
3. This appeal must be dismissed for failure to state a claim.

OPINION

Appellant's brief in opposition to respondent's motion to dismiss asserts the commission has subject matter jurisdiction over this appeal pursuant to s. 230.44(1)(a) and/or s. 230.44(1)(d), Stats.

Appellant's argument that there is jurisdiction pursuant to s. 230.44(1)(a), Stats., rests on a mis-statement of the language of this provision. Appellant's brief reads as follows:

Section 230.44(1)(a) . . . state[s]:

(a) Decision made or delegated by *secretary*. Appeal of a personnel decision under this subchapter made by the administrator or by an appointing authority under authority delegated by the administrator under s. 230.05(2). . . .

In this case, the appeal applies to a decision made by the *secretary* or their [sic] designee. Under s. 230.12(4)(b), the *secretary* may "deter-

mine the circumstances under which it is appropriate to for an appointing authority to grant, and authorize an appointing authority to grant, a general wage or parity adjustment, or appropriate portion thereof” (Appellant’s brief filed December 6, 2002, p. 2) (emphasis added)

However, s. 230.44(1)(a), Stats., actually says “Decision made or delegated by the *administrator*.” (emphasis added) The “administrator” here is the “administrator of the division [of merit recruitment and selection (DMRS) in the department of employment relations (DER)].” SS. 230.03(1), (10), Stats. Therefore, appellant’s attempt to tie this appeal to s. 230.12(4)(b), Stats., is completely inapposite, because that subsection describes a power of the secretary of DER, *see* ss. 230.03(13), (9), Stats. not a power of the administrator of DMRS. The commission’s authority to hear appeals of the secretary of DER is provided by s. 230.44(1)(b), Stats., and is limited to “decision[s] under s. 230.09(2)(a) or (d) or 230.13(1) made by the [DER] secretary or by an appointing authority delegated by the secretary.” Therefore, there is no possible basis for the commission to have jurisdiction over the subject matter of this appeal pursuant to s. 230.44(1)(a), Stats.

Appellant also contends the commission has subject matter jurisdiction under s. 230.44(1)(d), Stats., which provides: “A personnel action after certification which is related to the hiring process in the civil service and which is alleged to be illegal or an abuse of discretion may be appealed to the commission.” Appellant argues she “was hired at DCI on August 22, 2002. At that time, as shown by Respondent Exhibit 105, Appellant requested parity pay.” Respondent Exhibit 105, is an affidavit by DCI Deputy Warden Mark K. Heise, filed October 17, 2002, which provides, in part:

9. On August 22, 2002, Appellant interviewed for a Corrections Unit Supervisor position at DCI.

10. On August 22, 2002, Appellant requested parity pay of as much as \$3.00/hour to make up for a reinstatement decision she made in 1996 and for parity with other Unit Managers that had similar years of seniority and time in grade. . . .

* * *

12. On August 23, 2002, I informed Appellant that she would not receive a pay increase because it was not normal practice to grant pay increases for lateral movement to a position in the same classification with similar scope of duties and responsibilities.

It is apparent from the Findings of Fact, and particularly Finding 9, that appellant had been trying to obtain what she considered to be an equitable salary for a long time while at RCI prior to her transfer to TCI in 2001. When she transferred back to TCI in 2002, due to a potential layoff situation, she again raised the parity issue she had been raising at RCI while she had been employed there. The salary increase she wanted from RCI was based on the same rationale as the requests she had made in 1999 and 2000. However, notwithstanding that her request for salary consideration she made to Deputy Warden Heise on August 22, 2002, was essentially a reiteration of earlier requests, it literally fell within the scope of s. 230.44(1)(d), Stats., in that, with respect to the position at RCI into which appellant was transferring, her salary request was a personnel action, i. e., the determination of her starting salary, that occurred after the certification stage of that appointment and related to the hiring process in the classified service, because one aspect of the hiring process involves deciding how much to pay as starting salary the employee being hired (in this case, via a transfer), *see, e. g., Taddey v. DHSS*, 86-0156-PC, 6/11/87.

While the commission appears to have jurisdiction pursuant to a literal reading of s. 230.44(1)(d), Stats., over the subject matter of this appeal, respondent argues that this appeal involves a discretionary "performance award," and the commission's jurisdiction is supplanted by the operation of ss. 230.44(1)(e), 230.12(5)(e), and 230.45(2), Stats.

Section 230.44(1)(e) provides: "This subsection does not apply to decisions of an appointing authority relating to discretionary performance awards under s. 230.12."

Section 230.12(5)(e) provides:

Appeal of discretionary performance award. An employee who is dissatisfied with the evaluation methodology and results used by an agency to determine any discretionary performance award, or the amount of such award, may grieve the decision to the appointing authority under

the agency's grievance procedure. The decision of the appointing authority is final and may not be appealed to the commission under s. 230.44 or 230.45(1)(c).

Section 230.45(2) provides:

Subsection (1)(c)³ does not apply to an employee who, using the agency grievance procedure, grieves his or her dissatisfaction with the evaluation methodology and results used to determine any discretionary performance award or the amount of such an award. Any such employee grievance shall be settled on the basis of the appointing authority's decision.

It is apparent from these provisions that, to the extent the appellant's requested salary increase falls within the category of a discretionary performance award, the commission's potential jurisdiction is pre-empted by the foregoing statutory provisions.⁴ Neither party has cited any definition of the term "discretionary performance award." However, the term obviously involves a discretionary salary adjustment that is related to performance, and based on how appellant has tried to justify the compensation adjustment she has been requesting, see Finding of Fact 9, the request does not appear to be asking for something that is performance related.

Respondent has submitted excerpts from the "Glossary of Human Resource Terms as Used by the Division of Compensation and Labor Relations" (1992). This resource does not have a definition of "discretionary performance award." It does include three definitions that conceivably could have some relationship to discretionary performance awards:

Discretionary Compensation Adjustment (DCA): The discretion the appointing authority has to provide economic recognition for significant and permanent changes in job duties, increased competencies, or to address pay equity or retention needs. *See Comp. Plan, sec. J 5.00; related to "extrinsic rewards", "feedback", "incentive", "merit increase", and "lump sum merit"*

³ Section 230.45(1)(c), Stats., authorizes the commission to act as the final step arbiter in the non-contract grievance procedure.

⁴ Since the appellant is not pursuing this matter as an appeal of a non-contractual grievance, the provisions placing restrictions on using the grievance procedure to pursue denials of discretionary performance awards before the commission are inapplicable.

Discretionary Compensation Performance Recognition Awards (DCPRA) and payments: Rewarding employees for meritorious performance with base pay increases (DCPRA) and/or lump sum payments (Discretionary Compensation Performance Recognition Payments) throughout the fiscal year. *See Comp. Plan, Sec. A 2.03 and Sec. B 3.05(1)(c)(5) and (2); related to "Discretionary Compensation Adjustment", "extrinsic rewards," "feedback", "incentive", "merit increase", and "lump sum merit"*

* * *

Parity: Pay provisions for nonrepresented employees to provide an average level of pay adjustments for the biennium that is comparable to the average level for the related group of represented employees. Typically, the authorization for parity adjustments is acquired through amendments or modifications to the compensation plan established at the beginning of the biennium. *Related to "compression" and "internal equity"*

In its brief in support of the motion to dismiss, respondent overstates the reach of the prohibition on appeals of discretionary performance awards by expanding it to include all types of discretionary pay: "Statutory provisions (ss. 230.44(1)(e), 230.45(1)(a), and 230.12(5)(e), Wis. Stats.) prohibit the Personnel Commission from hearing appeals on the subject of *discretionary pay*." (Respondent's brief in support of motion to dismiss filed October 17, 2002, p. 6) (emphasis added) However, the provisions set forth above do not use such broad terminology, but refer specifically to "discretionary performance award[s]." As can be seen from the terms from the DER glossary, there are at least three types of salary adjustments--Discretionary Compensation Adjustment, Discretionary Performance Recognition Awards, and Parity--that arguably could relate to discretionary performance awards. That discretionary performance awards are but one of several types of discretionary pay adjustments is illustrated by s. 230.12(5)(a), Stats.:

(5) WITHIN RANGE PAY ADJUSTMENTS. (a) Pay advancements techniques, application. The varying circumstances and needs of the widely diverse occupational groups of state service must be recognized and met through several methods of systematic pay advancement. To this end the compensation program shall contain either individual or

combinations of pay advance techniques, and the pay schedules therein may contain provisions for a *variety of methods of within range progression, including, but not limited to discretionary performance awards, equity adjustments, "time in grade" adjustments, and other appropriate within range adjustments as may be provided in the compensation schedule.* (emphasis added)

With regard to the pay provisions in the DER glossary, the type of pay adjustment appellant has requested appears to best fit within the definition of Discretionary Compensation Adjustment, as appellant's request is based to a large extent on her comparison of her salary to that of her subordinates, and the definition of Discretionary Compensation Adjustment includes the language "to address pay equity or retention needs." This aspect of the definition is not based on performance, so there is no basis to conclude such an adjustment would be considered a discretionary performance award.

While the commission has jurisdiction over this appeal, it must address respondent's assertion that as a matter of law the merits of this controversy must be resolved in its favor. Respondent contends that s. ER 29.03(5), Wis. Adm. Code, compels the decision it reached with regard to appellant's starting salary upon her August 26, 2001, transfer. This code subsection provides:

(5) PAY ON TRANSFER

(a) In schedules where appropriate, when an employee transfers, the base rate paid may be at any rate within the pay range which is not greater than the last base pay rate received in the employee's former position with the following exceptions:

1. Employees who are not serving a probationary period shall receive a base pay rate not less than PSICM [permanent status in class minimum] for the class.
2. Employees who are involuntarily transferred for reasons other than disciplinary reasons shall retain their present rate of pay. If the present rate of pay exceeds the new pay range maximum, it shall be red circled and continued under the provisions of s. ER 29.025.

(b) Employees whose pay has been red circled and who voluntarily transfer to a different position shall lose their red circled rate.

Section ER 29.03(5)(a)1. does not apply, because, as respondent points out, see Respondent's Exhibit 109, there is no PSICM for appellant's classification. Section ER 29.03(5)(a)2. does not apply, because appellant was not transferred involuntarily. Section ER 29.03(5)(b) does not apply because appellant's pay was not red-circled. This leaves the general rule provided in s. ER 29.03(5)(a) which governs appellant's salary. Appellant could not have been paid any more "than the last base pay rate received in the employee's former position," or \$22.603/hour. Therefore, RCI Warden Bett had no alternative but to deny appellant's request for a starting salary up to \$3.00 more than her last base pay rate of \$22.603/hour.

Appellant's argues in opposition to this result that her pay could have been adjusted despite her transfer, pursuant to s. ER 29.04, Wis. Adm. Code:

Pursuant to Wis. Adm. Code ER 29.04, Multiple pay adjustments on same date, order of application:

- (1)
- (9) Transfer
- (13) Compensation plan or contractual adjustments pursuant to s. 230.12(3) or 111.92, Stats., respectively, including but not limited to within range pay adjustments other than those made under subs. (1) through (12) and (15).

The order of application clearly shows that, based on this order, the compensation plan or contractual judgment [sic], including "within range pay adjustments" are made after the transfer adjustment is set. This would create the situation where an equity adjustment, "time in grade" adjustment and other appropriate within range adjustment would still be available and applicable to Appellant. The standards set within ER 29.03 would therefore be irrelevant to this appeal, as adjustments can and do occur after any issue with the transfer is resolved. (Appellant's brief in opposition to the motion to dismiss filed December 6, 2002, p. 5)

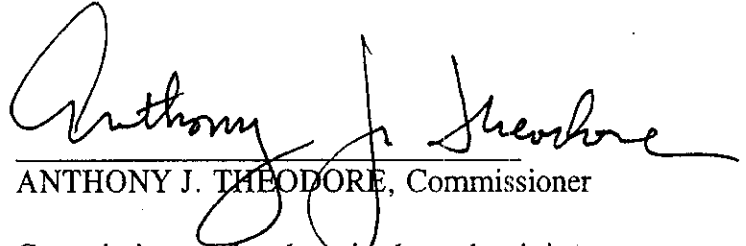
This rule provides the order of effectuation of pay adjustments that occur on the same date, and has no application to a case like this. Section 230.12(3), Stats., the

provision cross-referenced by s. ER 29.04(13), Wis. Adm. Code, is entitled "COMPENSATION PLAN: ESTABLISHMENT AND REVISION." Salary adjustments under this subsection would be a result of changes in the compensation plan, not adjustments specific to individual employees. The latter are covered by s. 230.12(5), which includes such actions as "discretionary performance awards, equity adjustments, [and] 'time in grade' adjustments." Furthermore, appellant's jurisdictional theory under s. 230.44(1)(d), Stats., depends on having a salary adjustment related to the hiring process, which in this case involves a transfer. Once the pay adjustment is divorced conceptually from the transfer, there is no more basis for jurisdiction under s. 230.44(1)(d), Stats., than there would be over a request by appellant for, say, an equity adjustment sometime after she was transferred.

ORDER

This appeal is dismissed for failure to state a claim.

Dated: June 18, 2003 STATE PERSONNEL COMMISSION


ANTHONY J. THEODORE, Commissioner

AJT:020045Arul1

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).

Parties:

Ann Marie Krueger 531 Rockrose Dr Fond du Lac, WI 54935	Matthew Frank, Secretary Department of Corrections 3099 East Washington Ave. P. O. Box 7925 Madison, WI 53707-7925
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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

IMPORTANT NOTICE: EFFECT OF 2003-2005 BUDGET BILL (Senate Bill 44)

The Governor has proposed, effective July 1, 2003, eliminating the Personnel Commission and distributing the Commission's authority between 1) the Wisconsin Employment Relations Commission (WERC) and 2) the Equal Rights Division (ERD) of the Department of Workforce Development. The legislation proposes that WERC assume jurisdiction over all appeals (denominated by case numbers in the format of 00-0000-PC) and that ERD assume jurisdiction over all complaints (denominated by case numbers in the format of 00-0000-PC-ER). In the event this proposed legislation is signed into law, the rights of parties to petition for re-

hearing or judicial review will be modified to the extent that after the effective date of that legislation, the appropriate successor agency to the Personnel Commission would 1) receive any Petition for Rehearing, and 2) would be named in and would receive any Petition for Judicial Review.

5/21/2003

AFDec notice re judicial rev5.21.03.doc