

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

STEVE BECK, Appellant,

vs.

DEPARTMENT OF CORRECTIONS, Respondent.

Case 7
No. 62784
PA(adv)-10

Decision No. 30877-A

Appearances:

Mary E. Kennelly, Fox & Fox, 124 West Broadway, Monona, WI 53716, appearing on behalf of Steve Beck.

Kathryn Anderson, Office of Legal Counsel, Department of Corrections, PO Box 7925, Madison, WI 53707-7925, appearing on behalf of the Department of Corrections.

EXAMINER'S ORDER ESTABLISHING ISSUE FOR HEARING

This matter is before the undersigned Hearing Examiner on the question of the appropriate issue for hearing. The parties have advanced separate proposals. The Appellant contends that the issue should read as follows:

Whether the disciplinary action imposed by Respondent by letter effective February 16, 2003, was for just cause.

The Respondent proposes the following issues:

1. Whether Respondent's action of reassigning the Appellant, effective February 16, 2003, was unreasonable and improper as specified in Sec. ER-MRS 30.10(2), Wis. Adm. Code.
2. Whether there was just cause for Respondent's action of reducing the Appellant's base pay effective February 16, 2003.

Dec. No. 30877-A

In light of the fact that this matter was filed with the Personnel Commission (PC) in March of 2003, the statutes and rules referenced in this ruling will be those in effect at that time. Pursuant to 2003 Wis. Act 33, effective July 26, 2003, the PC was abolished and its responsibilities in this area were transferred to the Wisconsin Employment Relations Commission (the Commission). The same legislation reorganized the executive branch so that the former Secretary of the Department of Employment Relations is now the Director of the Office of State Employment Relations in the Department of Administration. Having reviewed the arguments of the parties as well as the remaining documents in the case file, the Examiner makes and issues the following

FINDINGS OF FACT

1. The positions of warden, deputy warden and security director within the Department of Corrections are all within the Career Executive Program.
2. Immediately prior to February 16, 2003, Respondent employed the Appellant as the Warden of the Racine Correctional Institution (RCI). His base rate of pay was greater than \$31.854 per hour. Before working as the Warden of RCI, Appellant had been a deputy warden at Fox Lake Correctional Institution (FLCI) and before then had been a security director.
3. Appellant had successfully completed a career executive trial period and had attained permanent status in the Career Executive Program while a security director.
4. Respondent hand-delivered a letter of discipline to Appellant on February 14, 2003. The letter of discipline was signed by Steve Casperson, Administrator of the Division of Adult Institutions. It read, in part:

This letter is official notification of your removal as Warden at Racine Correctional Institution and appointment to Deputy Warden at New Lisbon, effective February 16, 2003. Upon appointment your base pay will be reduced to \$31.854. This rate reflects your rate of pay prior to your promotion in May 2002 plus the intervening General Wage Adjustment you would have received June 30, 2002 had you been in a Deputy Warden position. In addition, you are required to pay restitution to Racine Correctional Institution in the sum of forty-nine dollars and forty cents (\$49.40). These actions are the result of the violations of Department of Corrections Work Rules. . . .

I have concluded that you engaged in the following misconduct. . . .

The decision to remove you as a warden is based on a review of the investigation results and takes into consideration your tenure with the Department and lack of prior formal discipline.

5. The Deputy Warden position at New Lisbon Correctional Institution (NLCI) is at a lower classification level than the Warden position at RCI.

6. The Appellant was qualified to perform the work assigned to the Deputy Warden position after customary orientation.

7. Mr. Casperson issued a second letter to the Appellant dated February 14, 2003. That letter read:

This letter confirms your Career Executive reassignment to the Corrections Security Director position at Redgranite Correctional Institution, Division of Adult Institutions. This appointment will be effective February 23, 2003.

This Career Executive reassignment is a permanent civil service movement under the authority of ER-MRS 30.07, Wis. Admin. Code. No pay adjustment will result from this reassignment and you will not be required to serve an additional trial period. Your salary will remain at \$31.854 per hour.

Your position will be responsible for the development, implementation, and administration of the security program at Redgranite Correctional Institution. Your extensive background in security makes this reassignment a sound move.

8. Appellant filed a letter of appeal on March 10, 2003.

Based upon the above Findings of Fact, the Examiner makes and issues the following

CONCLUSION OF LAW

The Respondent's action of removing the Appellant from his Career Executive position as the Warden at RCI and placing him in another Career Executive position as the Deputy Warden at the New Lisbon Correctional Institution was a reassignment pursuant to Sec. ER-MRS 30.07, Wis. Adm. Code, rather than a demotion.

Based upon the above Findings of Fact and Conclusion of Law, the Examiner makes and issues the following

ORDER

The issue for hearing in this matter is as follows:

1. Whether Respondent's action of reassigning the Appellant, effective February 16, 2003, was unreasonable and improper as specified in Sec. ER-MRS 30.10(2), Wis. Adm. Code.
2. Whether there was just cause for Respondent's action of reducing the Appellant's base pay effective February 16, 2003.

Dated at Madison, Wisconsin, this 5th day of May, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Kurt M. Stege /s/

Kurt M. Stege, Examiner

Department of Corrections (Beck)

**MEMORANDUM ACCOMPANYING EXAMINER'S
ORDER ESTABLISHING ISSUE FOR HEARING**

The parties' dispute relates to the appropriate standard to be applied by the Commission when it reviews the personnel actions imposed by the letter of discipline dated February 14th that is described in Finding 4. The parties agree that one consequence of the letter was to reduce the Appellant's base pay. Respondent has conceded that this action falls within the scope of Sec. 230.44(1)(c), Stats., which grants the Commission the authority to review certain disciplinary actions:

If an employee has permanent status in class . . . 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.

The second consequence of the letter of discipline was to remove the Appellant from his position of Warden at RCI and place him in the Deputy Warden position at NLCI. Appellant contends this action was a "demotion" within the meaning of Sec. 230.44(1)(c), Stats., and must be analyzed in the context of the same "just cause" standard applicable to the review of Appellant's pay reduction. Respondent argues that the action constitutes a "reassignment" within the State's Career Executive Program and should be analyzed using the standard set forth in the administrative rules relating to Career Executive reassignments.

The Career Executive Program is authorized by Sec. 230.24, Stats., which provides, in part:

(1) The secretary [of the department of employment relations] may by rule develop a career executive program that emphasizes excellence in administrative skills in order to provide agencies with a pool of highly qualified executive candidates, to provide outstanding administrative employees a broad opportunity for career advancement and to provide for the mobility of such employees among the agencies and units of state government for the most advantageous use of their managerial and administrative skills. To accomplish the purpose of this program, the administrator [of the division of merit recruitment and selection] may provide policies and standards for recruitment, examination, probation, employment register control, certification, transfer, promotion and reemployment, and the secretary may provide policies and standards for classification and salary administration, separate from procedures established for other employment. The secretary shall determine the positions which may be filled from career executive employment registers.

Both the Secretary of the Department of Employment Relations (DER) and the Administrator of the Division of Merit Recruitment and Selection (DMRS) have promulgated administrative rules relating to the Career Executive Program. In Sec. ER-MRS 30.01(2), Wis. Adm. Code, the Administrator adopted the following policy statement:

The career executive program is an integral part of the civil service system of the state of Wisconsin and [is] subject to all statutes and the rules of the administrator. In accordance with the provisions of s. 230.24, Stats., where other statutes and rules conflict with s. 230.24, Stats., and the rules promulgated to effect such statute, the provisions of s. 230.24, Stats., shall take precedence.

Reassignment within the Career Executive Program is addressed in Sec. ER-MRS 30.07, Wis. Adm. Code:

- (1) Career executive reassignment means the permanent appointment by the appointing authority of a career executive within the agency to a different career executive position at the same or lower classification level for which the employee is qualified to perform the work after being given the customary orientation provided to newly hired workers in such positions.
- (2) When an appointing authority determines that the agency's program goals can best be accomplished by reassigning an employee in a career executive position within the agency to another career executive position in the same or lower classification level for which the employee is qualified, the appointing authority may make such reassignment, provided it is reasonable and proper. All such reassignments shall be made in writing to the affected employee, with the reasons stated therein.

Career Executive employee redress rights are set forth in Sec. ER-MRS 30.10, Wis. Adm. Code:

- (1) Career executive program employment grants to each employee thereunder rights and privileges of movement between positions within the program without examination and additional competition. Career executive reassignment and career executive voluntary movement to a position allocated to a classification assigned to a lower or higher pay range shall not be considered a demotion, or a promotion, respectively, and the statutory appeal rights provided thereto shall not apply.
- (2) Career executive reassignment by the appointing authority, as defined under s. ER-MRS 30.07(1) and referred to in sub. (1), is authorized without limitation. However, an employee with permanent status in the career executive program

may appeal the reassignment to the personnel commission if it is alleged that such reassignment either constitutes an unreasonable and improper exercise of an appointing authority's discretion or is prohibited by s. 230.18, Stats.

(3) Removal of an employee with permanent status in the career executive program from the career executive program which results in the placement of the employee in a position allocated to a classification assigned to a lower non-career executive pay range is defined as a demotion, and may be appealed.

(4) Permanent status in the career executive program grants an employee the same redress rights granted employees with permanent status in class under s. 230.44, Stats., except as provided in sub. (1).

Absent the provisions of either Sec. 230.24, Stats., or the relevant administrative rules, there would be little question that respondent's action of removing the Appellant from his Warden position at RCI and placing him in a Deputy Warden position at NLCI would constitute a "demotion for disciplinary purposes" as described in Sec. ER-MRS 17.04(1), Wis. Adm. Code., and Sec. 230.34(1)(a), Stats. As such, and as long as the Appellant's position was outside of a bargaining unit, he would be able to have the matter reviewed by this Commission pursuant to Sec. 230.44(1)(c), Stats. "Demotion" is defined in both Sec. ER 1.02(8) and Sec. ER-MRS 1.02(5), Wis. Adm. Code., as follows:

"Demotion" means 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 [as a demotion in lieu of layoff].

Respondent's action was clearly for purposes of discipline and the Appellant, who had permanent status in class, ended up in a lower classification. However, because the Appellant is a Career Executive employee and because both the Warden and the Deputy Warden positions are within the Career Executive program, his removal has to be viewed in the context of both Sec. 230.24, Stats., and the rules promulgated thereunder.

As noted in Sec. 230.24, Stats., the Career Executive Program is designed to "provide for the mobility of [program] employees . . . for the most advantageous use of their managerial and administrative skills." It is beyond dispute that after concluding its disciplinary investigation, the appointing authority decided Appellant's skills were better suited to the position of Deputy Warden than of Warden. If Respondent had removed the Appellant from the entire Career Executive Program and placed him in a position in a lower pay range, the action would have been a demotion as provided in Sec. ER-MRS 30.10(3), Wis. Adm. Code and the Appellant would have a right to obtain review of the action under the just cause standard of

Sec. 230.44(1)(c), Stats. As long as the movement was to another Career Executive position and the Appellant was qualified to perform the work after customary orientation, the action met the definition of a reassignment under Sec. ER-MRS 30.07(1), Wis. Adm. Code. Respondent is “authorized without limitation” to make such a reassignment, Sec. ER-MRS 30.07(2), Wis. Adm. Code it “shall not be considered a demotion . . . and the statutory appeal rights provided thereto shall not apply.” Sec. ER-MRS 30.07(1), Wis. Adm. Code. Instead, the reassignment may be appealed if it is alleged to be “an unreasonable and improper exercise of . . . discretion” or is alleged to constitute a form of discrimination prohibited by Sec. 230.18, Stats. The fact that the letter of discipline does not refer to Appellant’s move from the Warden position to the Deputy Warden position as a “reassignment” under Sec. ER-MRS 30.07(1), Wis. Adm. Code does not place the action outside of the definition found in that provision, irrespective of whether the move was for disciplinary or some other reason. Appellant was notified in writing of the action and the letter (Finding 4) set forth reasons for the action, as required by Sec. ER-MRS 30.07(2), Wis. Adm. Code.

Appellant has not contended that the reassignment violated Sec. 230.18, Stats., so the standard to be applied in this proceeding before the Commission is whether the reassignment was “an unreasonable and improper exercise of discretion.”

Both parties have cited *BASINAS V. STATE (PERSONNEL COMMISSION)*, 99 WIS. 2D 412, 229 N.W.2D 295 (1981) in their written arguments in this matter. In *BASINAS*, the court was interpreting statutes and rules as they existed in 1978 to determine whether Mr. Basinas could obtain review by the Personnel Commission of the decision to reassign him from his position as a bureau director in the Division of Corrections to the position of Superintendent of Oak Hill Correctional Institution. One such rule was Sec. PERS 30.10(3), Wis. Adm. Code which provided:

An appointing authority may reassign a career executive employee for disciplinary purposes only for just cause.

The court concluded that the Personnel Commission had jurisdiction under Sec. 230.44(1)(c), Stats. (1977), “over an appeal by a career executive employee from a reassignment to a job in a lower pay range if the appeal alleges that the reassignment was an unreasonable and improper exercise of discretion or was for disciplinary purposes.” In reaching this conclusion, the court worked backwards by reviewing administrative rules after they had been revised in 1981 as a basis for interpreting the rules as they existed in 1978. The 1981 version of Sec. PERS 30.10(4), Wis. Adm. Code specified that “[p]ermanent status [in the career executive program] grants an employee the same redress rights granted employees with permanent status in class under s. 230.44 Stats.” The court noted:

Under the new rules, sec. PERS 30.10, Wis. Adm. Code (1981), appeals by career executives of reassignments are to the [personnel] commission. In revising these rules, we must assume that the administrator was cognizant of the

statutory powers of the commission as set forth in secs. 230.44 and 230.45, Stats. Since appeals of the types permitted by sec. PERS 30.10, Wis. Adm. Code (1981), could only be heard by the commission under its authority to hear appeals of demotions pursuant to sec. 230.44(1)(c), we can only assume that the administrator intended actions appealable under sec. PERS 30.10(2) and (4) (1981) to be demotions appealable to the commission under sec. 230.44(1)(c).

The actions appealable under sec. PERS 30.10, Wis. Adm. Code (1981), are of the same nature as those appealable under sec. PERS 30.10, Wis. Adm. Code (1975). *BASINAS*, 104 WIS. 2D 539, 547-48 (footnotes omitted)

Nothing in the *BASINAS* decision explicitly stated that, on remand, the Personnel Commission was to apply a “just cause” standard for its review of the employer’s 1978 action, although certain language in the decision suggests that result. Nevertheless, there have been a variety of changes to the 1978 rules making it clear that under the current rules any action taken that qualifies as a Career Executive reassignment is not to be reviewed under the just cause standard and that the premises for the *BASINAS* decision have changed. Between 1978 and 1981, the Administrator deleted the language in Sec. PERS 30.10(3) (1975), Wis. Adm. Code that the employing agency could “reassign a career executive employee for disciplinary purposes *only for just cause*.” After the *BASINAS* decision, the Administrator also revised Sec. SPERS 30.10(4) (1981), Wis. Adm. Code so that it now reads:

Permanent status in the career executive program grants an employee the same redress rights granted employees with permanent status in class under s. 230.44, Stats., *except as provided in sub. (1)*. (Emphasis added.)

These changes eliminated any question whether, under the current administrative rules, an employee who has been reassigned within the meaning of Sec. ER-MRS 30.07(1), Wis. Adm. Code is entitled to a “just cause” review of the reassignment. The only review of a Career Executive reassignment is now provided by Sec. ER-MRS 30.07(2), Wis. Adm. Code and the standard is whether the reassignment “either constitutes an unreasonable and improper exercise of an appointing authority’s discretion or is prohibited by s. 230.18, Stats.” This matter will proceed on that basis.

Dated at Madison, Wisconsin, this 5th day of May, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Kurt M. Stege /s/

Kurt M. Stege, Examiner

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