

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MARK GOGGIN, Appellant,

vs.

Secretary, **DEPARTMENT OF TRANSPORTATION**, Respondent.

Case 2
No. 62918
PA(sel)-4

Decision No. 31153

Appearances:

Mark Goggin, 2115 Victory Street, LaCrosse, Wisconsin 54601, appearing on his own behalf.

Barbara F. Bird, Assistant General Counsel, P.O. Box 7855, Madison, Wisconsin 53707-7855, appearing on behalf of the Department of Transportation.

ORDER DENYING MOTION TO DISMISS

This matter is before the Wisconsin Employment Relations Commission (the Commission) on Respondent's motion to dismiss for lack of subject matter jurisdiction. The parties entered into a Stipulation of Facts, set forth below as Findings of Fact 2 through 17, and further agreed to forego an evidentiary hearing. Final briefs were due on April 9, 2004.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

FINDINGS OF FACT

1. Mark Goggin's letter of appeal in this matter reads, in part, as follows:

This letter concerns an interview that took place September 17, 2003. The interview in question was for a surveying position being offered at Transportation District #5. I would like to appeal the decision by the interview committee. The basis for this appeal is the discrepancy between the position description that was used in the hiring process, and the candidate [Patrick Savage] chosen for the position. I feel other criteria that I was not privy to, [were] used for the selection process.

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2. The Department of Transportation is organized into six divisions of which the Division of Transportation Districts is one. The Division of Transportation Districts is divided into eight geographic districts.

3. Transportation District #5 covers the counties of Buffalo, Trempealeau, Jackson, LaCrosse, Monroe, Vernon, Crawford and Richland and has its headquarters at 3550 Mormon Coulee Road, LaCrosse, Wisconsin 54601-6767.

4. The Division of Transportation Districts is authorized 1354 full-time equivalent positions of which Transportation District #5 is allocated 124. In March of 2005, the authorized positions for the Division of Transportation Districts will be reduced by 54 positions.

5. In September of 2003, Transportation District #5 had 135.33 filled full-time equivalent positions. The Department of Administration has imposed as a budget requirement that state agencies maintain a three percent (3%) vacancy rate. To meet this requirement, Transportation District #5 should have only 120.28 filled full-time equivalent positions.

6. If an incumbent leaves employment at Transportation District #5, the vacant position is either reallocated to another district that has fewer filled positions than are allocated to that district; reallocated to the Marquette interchange team which is allocated 35 positions but in September of 2003 had only 17 filled positions; kept vacant to be used to meet the 54 position reduction to be implemented in March of 2005; or kept vacant to meet the overall Division of Transportation District's budget requirement for a three percent (3%) vacancy rate. Through normal attrition, the goal of the Division of Transportation Districts is to reduce the number of filled full-time equivalent positions at Transportation District #5 to the number of allocated positions with a 3% vacancy rate or a total of 120.28 full-time equivalent positions.

7. On November 12, 2001, the Department of Administration imposed a hiring freeze for most state agencies including the Department of Transportation. If an incumbent leaves employment in a position covered by the hiring freeze, the position can only be refilled if a special exception is granted for a critical need. At the Department of Transportation, a request for a special exception to fill a critical position must be approved by the Deputy Secretary, Ruben Anthony, and by the Director of the Office of Planning and Budget, Alice Morehouse. Transportation District #5 has not requested approval for a special exception to fill any vacant positions since November 12, 2001.

8. In August of 2003, managers at Transportation District #5 determined that there was an operational need for an additional person to perform survey activities in the Survey/Mapping Unit in the Technical Services Section. The duties to be performed fell within the Surveyor classification which is assigned to pay range 14-03. Employees in positions in the Surveyor classification series are represented by the State Engineering Association (SEA). The 2001-2003 collective bargaining agreement between the State of Wisconsin and the SEA provides in Appendix B that employees in positions in pay range 14-03 will be reclassified to the Senior level classification after serving at least three (3) years in the classification series. The 2001-2003 SEA contract has been extended and continues in effect since July 1, 2003.

9. Since Transportation District #5 had no vacant positions in August of 2003, the operational need in the Survey/Mapping Unit in the Technical Services Section could only be met by assigning the work activities to an existing district employee.

10. In accordance with the policy of Transportation District #5, all district employees were advised of the opportunity for reassignment to the Survey/Mapping Unit. The announcement by electronic mail was sent on August 26, 2003 and indicated that employees in positions within pay range 14-03 or higher and employees eligible for reinstatement to that pay range could be considered for reassignment. Persons who previously had permanent status in class in positions assigned to a counterpart pay range to pay range 14-03 were eligible for reinstatement to pay range 14-03. Those employees who were interested in being considered for reassignment were asked to submit a resumé and a letter explaining why they felt they were qualified by September 4, 2003.

11. During the course of the 2001-2003 agreement between the State of Wisconsin and the Wisconsin State Employees Union (WSEU), the Wisconsin Employment Relations Commission issued a decision in the following unit clarification actions involving the WSEU and the SEA: Case 11, No. 50909, SE-12, Decision No. 11245-S; and Case 36, No. 50935, SE-13, Decision No. 11667-C. As a result of these decisions, six employees at Transportation District 5 were reallocated effective July 13, 2003 from Engineering Specialist Transportation – Senior to Engineering Technician Transportation –Advanced 2; seventeen employees at Transportation District 5 were reallocated effective July 13, 2003 from Engineering Specialist Transportation - Journey to Engineering Technician Transportation – Advanced; and one employee, Mr. John Pederson, Jr., was reallocated effective July 13, 2003 from Engineering Specialist Transportation to Engineering Technician Transportation - Senior. Employees in positions in the Engineering Specialist Transportation classification series are represented by the State Engineering Association and employees in positions in the Engineering Technician Transportation classification series are represented by the Wisconsin State Employees Union and are in the Technical Bargaining Unit. The Engineering Specialist Transportation - Journey classification is in pay range 14-23 which is a counterpart pay range to pay range 14-03; the Engineering Specialist Transportation – Senior classification is in pay range 14-24 which is a higher pay range than pay range 14-03; and the Engineering Specialist Transportation classification is in pay range 14-22 which is a lower pay range than pay range 14-03. The seventeen employees reallocated from Engineering Specialist Transportation – Journey to Engineering Technician Transportation – Advanced have reinstatement eligibility to classifications assigned to pay range 14-03 and pay range 14-23. The position numbers of the twenty-four reallocated employees did not change.

12. The Engineering Technician Transportation – Advanced classification is assigned to pay range 6-14 which is a lower pay range than pay range 14-23. The collective bargaining agreement between the State of Wisconsin and the WSEU in effect on July 13, 2003 contained a seniority based salary transaction grid applicable to reallocations to positions in the Technical Bargaining Unit. Due to application of this seniority based salary grid, some of the seventeen

employees at Transportation District #5 who were reallocated effective 7/13/03 from Engineering Specialist Transportation – Journey to Engineering Technician Transportation – Advanced received a salary increase. Those employees who would have received a salary decrease based on the seniority based salary grid were allowed to retain their base salary and any add-on by agreement between the State of Wisconsin and the WSEU. Patrick Savage, Lyle Smith, Mark Goggin and Jarrod Turk retained their current salaries when they were reallocated.

13. Four of the seventeen employees who had been reallocated to Engineering Technician Transportation – Advanced on July 13, 2003 expressed interest in being considered for reassignment to the Survey/Mapping Unit in the Technical Services Section. The four employees were: Patrick Savage, Lyle Smith, Mark Goggin and Jarrod Turk. In addition, Robert Gonia expressed interest in the reassignment. Mr. Gonia had voluntarily demoted from Engineering Specialist Transportation – Journey to Engineering Technician Transportation – Senior effective November 20, 2002. Mr. Gonia was also eligible for reinstatement to classifications in pay range 14-03 and pay range 14-23. Mr. John Pederson, Jr., also inquired about the reassignment. Mr. Pederson could not be considered because the highest classification in which he had permanent status was Engineering Specialist Transportation in pay range 14-22 and he, therefore, did not have reinstatement eligibility to classifications in pay range 14-03 or pay range 14-23.

14. The five interested employees were interviewed on September 17, 2003 by the supervisor of the Survey/Mapping Unit, Karen Olson, and three staff members of the division. After the interviews were completed, Ms. Olson selected Patrick Savage to be reassigned from the Project Development Section to the Technical Services Section. Mr. Savage's position number remained the same and so did his salary. For personnel records, the change in Mr. Savage's classification from Engineering Technician Transportation – Advanced to Surveyor as a result of Mr. Savage's changed duties was identified as a reinstatement. [A copy of Mr. Savage's new position description was attached to the Stipulation of Facts but is not attached to this ruling.]

15. Effective on November 2, 2003, Mr. Jarrod Turk's position was approved for reclassification from Engineering Technician Transportation – Advanced to Engineering Technician Transportation – Advanced 2. For personnel records, the upward change in classification was identified as a reinstatement.

16. The collective bargaining agreements between the State of Wisconsin and the SEA and the WSEU recognize in Article III of the respective agreements that management rights include the right to utilize personnel, methods, and means in the most efficient manner possible as determined by management. The collective bargaining agreements do not contain any provisions restricting the manner in which management may assign or reassign duties to filled positions.

17. The collective bargaining agreements between the State of Wisconsin and the SEA and the WSEU contain provisions regarding transfers in Article VII of the respective agreements.

The transfer provisions of both contracts apply to the filling of vacant positions. The WSEU contract further provides that a vacancy is created when the employer has approval to increase the work force and decides to fill the new positions or when there is a termination, transfer out of the bargaining unit, promotion or demotion, resignation, or retirement and the employer decides to replace the previous incumbent.

Based on the above and foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSIONS OF LAW

1. The Appellant has the burden to establish that the Commission has subject matter jurisdiction over this matter as a civil service appeal pursuant to Sec. 230.44(1) or .45, Stats.
2. Appellant has sustained his burden.
3. This matter falls within the scope of Sec. 230.44(1)(d), Stats.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following

ORDER

Respondent's motion to dismiss this matter for lack of subject matter jurisdiction is denied.

Given under our hands and seal at the City of Madison, Wisconsin, this 23rd day of November, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

MEMORANDUM ACCOMPANYING
ORDER DENYING MOTION TO DISMISS

This appeal arises from an action taken by the Department of Transportation (DOT) to realign its resources with its responsibilities. As described more fully in the Findings of Fact, DOT concluded it had increased surveying responsibilities that could not be adequately performed given the existing work assignments for Transportation District #5 staff. The agency was subject to a statewide hiring freeze which, along with other constraints, effectively prevented it from creating an additional position in the District. Respondent chose to address the surveying responsibilities by using existing District #5 staff to perform the work, which fell within the civil service classification of Surveyor. The Surveyor classification is assigned to pay range 14-03.

Respondent informed all District #5 employees of the opportunity to perform surveying work within the Surveyor classification series (a classification assigned to a bargaining unit represented by the State Engineering Association) and indicated that employees eligible for reinstatement to pay range 14-03 or higher could be considered. Patrick Savage, Appellant Mark Goggin and three other district employees all expressed an interest. Each of the five had reinstatement eligibility for civil service classifications assigned to pay range 14-03.

Respondent interviewed all five employees and decided to have Patrick Savage, who filled a position classified at the Engineering Technician Transportation-Advanced level, perform the surveying responsibilities. Respondent moved Mr. Savage and his position from the District's Project Development Section to the Surveying/Mapping Unit in the District's Technical Services Section. The move did not change Mr. Savage's salary, the position number assigned to his position or the total number of filled positions in District #5. However, it changed the duties assigned to the position filled by Mr. Savage as well as the position's civil service classification, which also had the effect of moving the position from the Technical Bargaining Unit (represented by the Wisconsin State Employees Union) into another bargaining unit represented by the State Engineering Association. Respondent denominated the transaction on the requisite personnel records as a "reinstatement." However, Respondent contends that Mr. Savage was actually "reassigned" into the Surveying/Mapping Unit. Mr. Goggin appealed from the decision not to have him perform the Surveyor responsibilities and Respondent filed a motion to dismiss for lack of subject matter jurisdiction, arguing that a "reassignment" is not a reviewable transaction.

The Commission's jurisdiction over civil service appeals is set forth in Sec. 230.44(1) and 230.45, Stats. The action that is the subject of this appeal appears to have been taken by the employing agency, DOT, rather than by either the Administrator of the Division of Merit Recruitment and Selection (Sec. 230.44(1)(a), Stats.) or the Director of the Office of State Employment Relations (Sec. 230.44(1)(b), Stats.) 1/ The action was not a form of discipline reviewable under either Sec. 230.44(1)(c) or (f), Stats., nor did it relate to a noncompetitive

appointment of a disabled veteran (Sec. 230.44(1)(dm), Stats.). The case does not reach the Commission as a non-contractual grievance (230.45(1)(c), Stats.) or relate to hazardous duty benefits as provided in Sec. 230.45(1)(d), Stats.

1/ To the extent the position filled by Mr. Savage might be considered to have been reallocated due to a “logical change in the duties and responsibilities of a position” as provided in Sec. ER 3.01(2)(f), Wis. Adm. Code, there is no suggestion that the Appellant is contesting the propriety of the new class level (Surveyor) assigned to the position. Elsewhere in this Order, the Commission addresses other consequences of a change in a position’s classification.

The remaining area of the Commission’s statutory authority is Sec. 230.44(1)(d), Stats., which provides:

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. (Emphasis added.)

The highlighted phrase has been the subject of several interpretive rulings explaining that the reference to “after certification” is to a point in the hiring process that differentiates the authority of the Administrator of the Division of Merit Recruitment and Selection (DMRS) to provide the appointing authority with a list of candidates to be considered for hire, from the authority vested with the employing agency to make a selection decision. 2/

2/ As provided in Sec. 230.25(1), Stats:

Appointing authorities shall give written notice to the administrator of any vacancy to be filled in any position in the classified service. The administrator shall certify, under this subchapter and the rules of the administrator, from the register of eligibles appropriate for the kind and type of employment, the grade and class in which the position is classified, any number of names at the head thereof.

One such case is WING v. DER, 84-0084-PC, 4/3/85. In that matter, the appellant was an unsuccessful candidate for a vacant Budget and Management Analyst (BMA) position. In order to be considered for the vacancy, the candidate had to be “eligible to be appointed to this position on a transfer or voluntary demotion basis.” Appellant qualified to be a candidate because he was already filling a BMA 4 position. Because eligibility for the position was

premised on the candidate's ability to be appointed on a transfer or voluntary demotion basis, DMRS never developed or administered a civil service examination to fill the position, nor did it certify any names from an examination register. This process is permitted by what is currently ER-MRS 12.02(3), Wis. Adm. Code:

The administrator may submit the names of persons interested in transfer, reinstatement or voluntary demotion along with a certification or, at the request of the appointing authority, in lieu of a certification.

The ruling in WING, SUPRA, concluded that the Commission's authority under Sec. 230.44(1)(d), Stats., extended to appeals of appointment decisions even where there had been no certification of eligibles:

The apparent intent of Sec. 230.44(1)(d), Stats., is to permit, *inter alia*, appeals of appointment decisions. Those decisions are made in all instances by the appointing authority. There are no apparent policy reasons for interpreting Sec. 230.44(1)(d), Stats., to permit appeals of appointment decisions only when an actual certification by the administrator preceded the selection decision. An interpretation of the phrase "personnel action after certification" to exclude appointment decisions that were not preceded by a particular certification would result in an illogical distinction within one category of personnel selection decisions. An employee seeking reinstatement, voluntary demotion, or transfer into a position could appeal an alleged abuse of discretion in the appointment decision if the appointing authority's consideration of eligibles included those certified as a result of competition, but could not appeal if there was no such certification because the appointing authority had requested only the names of those interested in transfer, reinstatement or voluntary demotion. . . .

The Commission is convinced that no such distinction was intended and that the legislature utilized the phrase "after certification" to refer to a certain segment in the appointment process.

As noted above, Respondent contends that Mr. Savage was "reassigned" in order to perform the surveying responsibilities. Respondent goes on to argue that the following language from the Personnel Commission's decision in ASCHE V. DOC, 90-0159-PC, 4/21/97, should be interpreted to hold that reassignment actions fall outside the scope of the Commission's jurisdiction under Sec. 230.44(1)(d), Stats:

The reassignment of appellant [who was employed in a position classified as an Officer (Lieutenant)] from the security unit [at the University of Wisconsin Hospital and Clinics] to the Oakhill Correctional Institution is clearly not a personnel action “after certification which is related to the hiring process.” As a result, the Commission concludes that it does not have subject matter jurisdiction over the second stated issue.

ASCHE v. DOC, 90-0159-PC, 4/21/97. The employing agency had disciplined Mr. Asche for failing to follow the agency’s harassment policy. His discipline consisted of both a 15 day suspension and “reassignment to Oakhill Correctional Institution.” The reassignment had the effect of changing the Mr. Asche’s work location from UW Hospital and Clinics to Oakhill, but it did not move him into a new position, nor did it cause a change to the classification of his position. The facts in ASCHE and the instant dispute are hardly interchangeable. While ASCHE may appropriately be cited as precedent for the proposition that Sec. 230.44(1)(d), Stats., fails to provide subject matter jurisdiction over an appointing authority’s action of moving one employee from one work location to another (without a change to the position’s classification and without any competition between candidates), it fails to serve as compelling precedent on the question of whether the same statutory paragraph provides jurisdiction over a decision selecting one person from among five current agency employees who are interested in performing a completely new set of duties that will require the employee to work in a different classification.

Denominating the present transaction

An underlying problem with using the term “reassignment” to describe the action taken in the present case is that the term is undefined in both the statutes and the rules so it can take on (and has taken on) a variety of meanings. For example, in Kelley v. DILHR, 93-0208-PC, 2/23/94, the Personnel Commission used the term “reassignment” in portions of its ruling to describe a personnel action that the appellant in that case contended was a demotion and the respondent contended was a transfer. The transaction involved moving the appellant from one Attorney 14-Management position as Director of the Bureau of Legal Affairs to a second Attorney 14-Management position as deputy director of the same bureau. The PC analyzed the “reassignment” and concluded that it was, in fact, a transfer. The PC went on to hold that the transaction moving the appellant into the deputy position, without any certification and without consulting the appellant, could be reviewed under Sec. 230.44(1)(d), Stats.

If “reassignment” is a term that has no specific meaning for purposes of the State civil service code, it raises the question whether there is another term that appropriately encompasses the transaction that is the subject of this appeal.

In its personnel records, DOT referred to the transaction as a “reinstatement.” Previous decisions of the Personnel Commission have asserted jurisdiction pursuant to Sec. 230.44(1)(d), Stats., over decisions by an appointing authority to deny reinstatement. In *SEEP V. DHSS*, 83-0032-PC, 83-0017-PC-ER, 10/10/84, the Personnel Commission rejected a jurisdictional objection to a 230.44(1)(d) review of the employer’s decision not to reinstate the appellant where other persons had previously been certified. The ruling rejected the assertion that the appellant herself must have been certified as a precondition to establishing jurisdiction. The Personnel Commission’s subsequent decision finding that the employer had abused its discretion when it had not reinstated the appellant was upheld on judicial review. *SEEP V. DHSS*, 83-0032-PC, 83-0017-PC-ER, 10/10/84; affirmed in part, reversed in part by *RACINE CIRCUIT COURT, SEEP V. STATE PERS. COMM.*, 84-CV-1705, 84-CV-1920, 6/20/85; supplemental findings were issued by the Commission on 2/2/87; affirmed in part, reversed in part by *COURT OF APPEALS DISTRICT 11*, 140 WIS 2D 32, 5/6/87; [Note: the effect of the Court of Appeals decision was to affirm the Commission’s decision in all respects] In *WEDEKIND V. DOC*, 98-0091-PC, 2/24/99, the appellant had quit his employment with respondent in November of 1997 but one month later submitted a letter requesting reinstatement. As a consequence of his reinstatement eligibility, the appellant proceeded to an interview for a vacant Youth Counselor 1 position without going through the civil service exam procedure. At the time of the interview, he completed a written form relating to his conviction record. He was subsequently rejected from any further consideration based on the information on his conviction record form. Appellant’s appeal seeking review of the rejection was processed under Sec. 230.44(1)(d), Stats. Similarly, in *PETTAWAY V. DPI*, 01-0013-PC, 9/23/01; the PC denied respondent’s jurisdictional objection to review the employer’s decision not to reinstate Ms. Pettaway before considering additional candidates.

The term “reinstatement” is defined in Sec. ER 1.02(41) and ER-MRS 1.02(29), Wis. Adm. Code, as:

[T]he act of permissive reappointment without competition of an employee or former employee under s. 230.31, 230.33, 230.34 or 230.40(3), Stats., to a position: (a) in the same class in which the person was previously employed; (b) in another classification to which the person would have been eligible to transfer had there been no break in employment; or (c) in a class having a lower pay rate or pay range maximum for which the person is qualified to perform the work after the customary orientation provided to newly hired workers in the position.

The parties have stipulated that both Savage and Goggin were eligible for reinstatement based on the prior reallocation of their positions from Engineering Specialist Transportation-Journey to Engineering Technical Transportation-Advanced. 3/ The other key stipulated fact is that Respondent’s personnel records refer to the transaction that is the subject of this appeal

as a “reinstatement.” The parties further agree that: 1) five District #5 employees sought to perform the new Surveyor responsibilities; 2) all 5 employees were interviewed by a panel consisting of 4 individuals already employed in the Surveying/Mapping Unit; and 3) Mr. Savage was the person selected from among the 5 who were considered. Under these circumstances, the Commission is unaware of any reason why the transaction does not fall within the scope of Sec. 230.44(1)(d), Stats. Certainly the effect of DOT’s actions was to eliminate an excess ETT-Advanced position in District #5, to create a new position assigned to the Surveyor classification and to hire Mr. Savage to perform the new set of duties after deciding between 5 candidates, all of whom were eligible for reinstatement. This is precisely the type of selection decision encompassed by Sec. 230.44(1)(d), Stats.

3/ The reinstatement eligibility of both Mr. Savage and Mr. Goggin is presumably premised on their reallocations in 2003 from Engineering Specialist Transportation – Senior to Engineering technician Transportation – Advanced and on Sec. ER-MRS 16.035 , Wis. Adm. Code, which provides, in part:

(3) DOWNWARD REALLOCATION OR RECLASSIFICATION OF A POSITION. . . . An employee whose position has been reallocated or reclassified to a lower class on or after July 5, 1998, shall have reinstatement eligibility in any agency for 5 years from the date of the action. . . .

It should also be pointed out that if it was determined that DOT, instead of reinstating Mr. Savage, had reallocated the position occupied by Mr. Savage (pursuant to authority delegated by the Director of OSER), that action would have merely changed the classification of the position rather than the classification of Mr. Savage as the position incumbent. A reallocation, as defined in Sec. ER 3.01(2), Wis. Adm. Code, is “the assignment of a position to a different class . . . based upon . . . [a] logical change in the duties and responsibilities of a position.” Once a position has been reallocated, a decision still has to be made whether to “regrade” the incumbent. Pursuant to Sec. ER 3.01(4), WIS. ADM. CODE.

“Regrade” means the determination of the director [of the office of state employment relations] under s. 230.09(2)(d), Stats., that the incumbent of a filled position which has been reallocated or reclassified should remain in the position without opening the position to other candidates.

Regrade of the incumbent is appropriate if the changes to the duties assigned to the position have occurred gradually and were a logical outgrowth of the responsibilities that were already being performed. However, if there is an abrupt and wholesale change to a position that requires a new set of abilities, the change requires a competitive opportunity to perform the

new duties. OLSON v. DILHR [DWD] & DER, 96-0015-PC, 10/22/96; SANNES v. DER, 92-0085-PC, 8/23/93. There is little question that the transaction in the present case occurred as a result of a complete and abrupt change in responsibilities so that they were no longer accurately described by the same ETT-Advanced classification specification. 4/ As noted above, the definition of “regrade” specifies that such a decision is made “under s. 230.09(2)(d).” Regrade decisions are among those actions that are subject to review by the Commission pursuant to Sec. 230.44(1)(b), Stats:

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

So even if the transaction had not been identified by the Respondent as a reinstatement, a decision to regrade Mr. Savage rather than to open the position to competition would be reviewable under Sec. 230.44(1)(b), Stats.

4/ In addition, Sec. ER 3.03(1), Wis. Adm. Code, provides that “Appointing authorities shall notify the director of any changes in the duties or responsibilities of individual positions which may effect the classification level of the position.”

Effect of Sec.111.93(3), Stats.

DOT also argues that pursuant to Sec. 111.93(3), Stats., existing bargaining agreements may supersede the authority of this Commission to exercise jurisdiction over a civil service personnel appeal that was filed under Sec. 230.44(1), Stats. 5/ Section 111.93(3), Stats., provides:

Except as provided . . . if a collective bargaining agreement exists between the employer and a labor organization representing employees in a collective bargaining unit, the provisions of that agreement shall supersede the provisions of civil service and other applicable statutes . . . related to wages, fringe benefits, hours, and conditions of employment whether or not the matters contained in those statutes . . . are set forth in the collective bargaining agreement.

5/ The Commission’s ruling in this matter should not be interpreted as extending into other areas of its jurisdiction.

Respondent's argument is premised on its assertion that this appeal relates to the reassignment of duties to a filled position. The Commission has rejected the underlying assertion. Respondent's submissions do not address the effect of Sec. 111.93(3), Stats., on the exercise of jurisdiction over a classified civil service appointment decision (except as a transfer) or a reallocation/regrade decision. In addition, the relevant bargaining agreements are not of record. Given these circumstances, the Commission declines, at this time, to address an argument based on Sec. 111.93(3), Stats.

While the Commission is denying the Respondent's motion to dismiss for lack of subject matter jurisdiction, Respondent will be granted an opportunity to reassert an argument that Sec. 111.93(3), Stats., supersedes the Commission's authority to hear this matter. If any such argument is premised upon language in a collective bargaining agreement, the argument will likely require specific evidence regarding the language of the bargaining agreement and its proper interpretation.

A representative of the Commission will contact the parties for the purpose of scheduling further proceedings in this matter.

Dated at Madison, Wisconsin, this 23rd day of November, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

