

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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**ELIZABETH KOHL**, Appellant,

vs.

**Director, OFFICE OF STATE EMPLOYMENT RELATIONS and  
Secretary, DEPARTMENT OF AGRICULTURE, TRADE AND CONSUMER  
PROTECTION, Respondents.**

Case 608  
No. 62902  
PA(der)-68

(formerly Case No. 02-0013-PC)

**Decision No. 30996-A**

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**ELIZABETH KOHL**, Appellant,

vs.

**Secretary, DEPARTMENT OF AGRICULTURE, TRADE AND CONSUMER  
PROTECTION, Respondent.**

Case 2  
No. 65094  
PA(adv)-83

**Decision No. 31569**

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**Appearances:**

**Nicholas E. Fairweather**, Cullen, Weston, Pines & Bach, LLP, Attorney at Law, 122 West Washington Avenue, Suite 900, Madison, Wisconsin 53703, appearing on behalf of the Appellant.

**David J. Ghilardi**, Assistant Legal Counsel, Department of Agriculture, Trade and Consumer Protection, P.O. Box 8911, Madison, Wisconsin 53708-8911, appearing on behalf of the Respondent DATCP.

**David J. Vergeront**, Chief Counsel, Office of State Employment Relations, P.O. Box 7855, Madison, Wisconsin 53707-7855 appearing on behalf of Respondent OSER

**ORDER GRANTING MOTION FOR SUMMARY JUDGMENT  
AND MOTION TO DISMISS**

These matters are before the Commission on motions filed by Respondents Department of Agriculture Trade and Consumer Protection (DATCP) and the Office of State Employment Relations (OSER).

Dec. No. 30996-A  
Dec. No. 31569

The first appeal (Kohl I) arises from the action taken to reassign the Appellant, Elizabeth Kohl, to a new collection of duties effective February 24, 2002. Appellant filed her appeal on March 7, 2002.

During a pre-hearing conference held on September 18, 2002, the parties agreed to bifurcate the proceeding so the initial hearing would be limited to the following issue:

Whether the position to which appellant was reassigned [on February 24, 2002] was properly classified as an Administrative Manager? If not, what is the proper classification?

The parties also agreed that depending on the resolution of this initial topic, it might be necessary to schedule a second hearing relating to the remaining issues raised by the appeal.

After the hearing on the initial issue was held in December 2002, the Commission issued an Interim Decision and Order on July 23, 2004.<sup>1</sup> The Commission rejected the Respondents' decision classifying the position at the Administrative Manager level rather than the Program and Planning Analyst – Advanced Management level. In October 2004, Respondents reallocated Ms. Kohl's position. The parties subsequently agreed to the following statement of the remaining issues in Kohl I:

- a. What is the proper remedy?
- b. Whether OSER's reallocation of the Appellant's position on October 3, 2004, and the Appellant's current duties and assignments, provide a proper remedy?

In January 2005, Respondents filed what amounted to a motion for summary judgment on the remedy issues, contending no additional remedy was available to Appellant. On July 15, 2005, DATCP again reassigned Ms. Kohl. Appellant filed another appeal (Kohl III) with the Commission in August 2005. However, the Appellant has stipulated that Kohl III relates to her reassignment in 2002 and the reallocation of her position in 2004, rather than to her July 2005 reassignment. Appellant has further stipulated that she is not alleging a violation of Sec. ER-MRS 30.10, Wis. Adm. Code, with regard to the July 2005 reassignment.

DATCP moved to dismiss Kohl III and the parties agreed to a briefing schedule regarding Respondents' motions in both matters that concluded on October 24, 2005.

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<sup>1</sup> Much of the delay in issuing a decision was a consequence of 2003 Wis. Act 33, which abolished the Personnel Commission (where the matter was initially filed) and transferred the case to the Wisconsin Employment Relations Commission in July, 2003.

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

### **FINDINGS OF FACT**

1. Immediately prior to the 2002 reassignment that served as the genesis for Kohl I, Elizabeth Kohl served 2 years as the Deputy Administrator in DATCP's Food Safety Division. The position was part of the Career Executive program described in Sec. 230.24, Stats., and Ch. ER 30 and ER-MRS 30, Wis. Adm. Code.

2. In order for a position to be included in the Career Executive program, it must be in a classification assigned to pay range 81-01 or 81-02 or, under those circumstances specified in Sec. ER 30.02, Wis. Adm. Code, be in a classification assigned to a comparable pay range.

3. Early in 2002, the Secretary of DATCP, James Harsdorf, decided to eliminate Kohl's Deputy Administrator position in the Division of Food Safety and assign her to a different collection of duties because the administrative and compliance portions of that division and the Division of Animal Health were to be combined for budgetary reasons. Shiela Graham of the Division of Animal Health assumed the combined administrative responsibilities for the two areas.

4. By January 30, 2002, DER had reviewed the position description that DATCP had prepared to describe the new set of duties to be assigned to Ms. Kohl. DER concurred that the position was best described in the Administrative Manager classification which is assigned to pay range 81-01 and is part of the Career Executive program.

5. Ms. Kohl's new set of duties satisfied the statutory definition of "management" in Sec. 111.81(13), Stats., but did not satisfy the definition of "confidential" or "supervisor" in Sec. 111.81(7) and (19), Stats. The first-line supervisor for the position was a division administrator and the number of employees in the department is such that DATCP is smaller than a "major" agency.

6. The Administrative Manager classification specification limited the scope of the class to supervisory positions.

7. In its July 23, 2004 Interim Decision and Order, the Commission reviewed the evidence of record regarding approximately ten other classifications and concluded that Ms. Kohl's position was excluded from all except Program and Planning Analyst (PPA) and

PPA – Advanced Management. The Commission concluded that Ms. Kohl’s new set of duties was best described by the PPA – Advanced Management classification and issued the following Order:

Respondents’ [2002] decision allocating the Appellant’s position to the Administrative Manager classification rather than the Program and Planning Analyst – Advanced Management classification is rejected. The Commission will contact the parties for the purpose of conducting a status conference and, if necessary, to schedule further proceedings.

The PPA – Advanced Management classification is assigned to a pay range that is outside of the Career Executive program.

10. Effective October 3, 2004, OSER modified the existing classification entitled “Policy Initiatives Advisor – Executive” (PIA – Executive) which is assigned to pay range 81-01. OSER notified Ms. Kohl that it had reallocated her position to the new PIA – Executive class, effective October 3<sup>rd</sup>. Kohl filed an appeal of the reallocation decision (Kohl II) but subsequently withdrew the claim.

11. The duties and responsibilities assigned to Ms. Kohl’s position at that time were referenced in the PIA – Executive classification specification as an example of a position that is properly classified at that level.

12. As of July 15, 2005, Ms. Kohl was reassigned to the position of Deputy Administrator of the Division of Food Safety with the classification of Administrative Manager (PR 81-01).

13. On August 25, 2005, Ms. Kohl filed another appeal (Kohl III) with the Commission relating to her 2002 reassignment and 2004 reallocation.

14. Ms. Kohl has been paid at the 81-01 level or higher since she began her official employment with DATCP in 1990 and is currently being paid at that level.

15. Except for her pending request for fees and costs in Kohl I, Ms. Kohl has not identified any remedy that has not already been provided to her by way of the reallocation in October 2004 and subsequent reassignment.

### CONCLUSIONS OF LAW

1. Kohl I is properly before the Commission pursuant to Sec. 230.44(1)(c), Stats.
2. The Appellant ultimately has the burden to show she is entitled to some remedy.

3. With the exception of her pending request for fees and costs (which will be addressed separately as provided in Sec. 227.485, Stats.), there are no genuine issues of material fact in Kohl I and Respondents are entitled to judgment on the question of remedy in that matter as a matter of law.

4. The Appellant has the burden to establish that Kohl III was timely filed.

5. Appellant has not sustained her burden on the timeliness question.

### ORDER

Respondent DATCP's motion for summary judgment on the issue of remedy is granted and the Commission will retain jurisdiction in Kohl I solely for the purpose of addressing Appellant's request for fees and costs pursuant to Sec. 227.485, Stats., and issuing a final order.

Kohl III is dismissed as untimely filed.

Given under our hands and seal at the City of Madison, Wisconsin, this 5<sup>th</sup> day of January, 2006.

#### WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Paul Gordon /s/

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Paul Gordon, Commissioner

Susan J. M. Bauman /s/

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Susan J. M. Bauman, Commissioner

Chairperson Judith Neumann did not participate.

Parties (for purposes of DATCP (Kohl), Case 2 No. 65094 PA(adv)-83 only)

Elizabeth Kohl  
109 Frigate Drive  
Madison, WI 53705

Rod Nilsestuen  
Secretary, DATCP  
PO Box 8911  
Madison, WI 53708-8911

**Office of State Employment Relations and Department of Agriculture, Trade and Consumer Protection (Kohl I and Kohl III)**

**MEMORANDUM ACCOMPANYING ORDER GRANTING MOTION FOR SUMMARY JUDGMENT (Kohl I) AND MOTION TO DISMISS (Kohl III)**

**Kohl I**

This matter arises from Ms. Kohl's allegation that she was constructively demoted from her Career Executive position as Deputy Administrator of the Food Safety Division for DATCP when she was assigned different duties in February 2002. After hearing and after an Interim Decision and Order by the Commission found that Appellant's changed duties were better described at a lower classification level outside the Career Executive program, Respondents revised the classification structure and reallocated the Appellant's position to a Career Executive classification in 2004. Then in 2005, DATCP again reassigned Kohl. The parties agree that the only remaining issues in terms of the 2002 appeal are:

- a. What is the proper remedy?
- b. Whether OSER's reallocation of the appellant's position on October 3, 2004, and the appellant's current duties and assignments [now as Deputy Administrator of DATCP's Food Safety Division], provide a proper remedy?

Respondent DATCP has filed a motion for summary judgment, contending that the 2004 reallocation and 2005 reassignment have already provided the only remedy that would be appropriate in this matter<sup>2</sup> and has supported its motion with an affidavit. Ms. Kohl contends that DATCP has failed to supply a factual basis for the assertion that there is no other appropriate remedy and suggests that a fact-finding hearing is necessary.

In DOC & DER (SCOTT), DECISION No. 30767 (WERC, 1/04), the Commission summarized its approach to a summary judgment motion<sup>3</sup> as follows:

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<sup>2</sup> In addition, it is undisputed that the Commission still has to address the Appellant's request that as a prevailing party she be awarded fees and costs under Sec. 227.485, Stats., the Equal Access to Justice Act.

<sup>3</sup> Contrary to the contention in Appellant's brief dated October 13, 2005, summary disposition of a State civil service appeal is appropriate under Sec. 227.42(1)(d), Stats., where the disposition does not require the resolution of any disputes of material fact. *BALELE V. WISCONSIN PERSONNEL COMMISSION*, 223 Wis.2d 739, 589 N.W.2d 418 (1998).

The Commission may summarily decide a case when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Generally speaking, the following guidelines apply. The moving party has the burden to establish the absence of any material disputed facts based on the following principles: a) if there are disputed facts, but they would not affect the final determination, they are immaterial and insufficient to defeat the motion; b) inferences to be drawn from the underlying facts contained in the moving party's material should be viewed in the light most favorable to the party opposing the motion; and c) doubts as to the existence of a genuine issue of material fact should be resolved against the party moving for summary judgment. The non-moving party may not rest upon mere allegations, mere denials or speculation to dispute a fact properly supported by the moving party's submissions. If the non-moving party has the ultimate burden of proof on the claim in question, that ultimate burden remains with that party in the context of the summary judgment motion. (Citations omitted.)

The Commission went on to consider four factors in determining whether it would be appropriate to consider a motion for summary judgment in the context of a matter filed under Sec. 230.44, Stats.: 1) Whether the factual issues raised by the motion are inherently more or less susceptible to evaluation on a dispositive motion; 2) whether the particular Appellant could be expected to have difficulty responding to a dispositive motion; 3) whether the Appellant could be expected to encounter difficulty obtaining the evidence needed to oppose the motion; and 4) whether the Appellant has engaged in an extensive pattern of repetitive and/or predominately frivolous litigation.

The Commission now turns to applying these factors to this case. The present motion does not focus on subjective intent and instead relies upon undisputed facts. The Appellant, who is represented by counsel, is in the best position to determine the remedy she is seeking in this matter and to identify any aspects of the October 2004 reallocation action and July 2005 reassignment that might be contrary to any remedy she seeks. There was no showing that Appellant has engaged in an extensive pattern of repetitive and/or predominately frivolous litigation. Under these circumstances and in order to determine whether a hearing is necessary, the Commission will address DATCP's motion.

The hearing on the classification issue established that in 2002, DATCP revised its organizational structure so the administrative responsibilities that had been assigned to Ms. Kohl as the Deputy Administrator of the Division of Food Safety were reassigned to the Deputy Administrator of the Division of Animal Health, Ms. Graham. At the same time, DATCP assigned a new collection of duties to Ms. Kohl and the duties were not consistent with classifying her duties at a level within the Career Executive program. Neither Respondent actually changed the classification of her position or reduced her rate of pay. Once

the Commission issued its Interim Decision and Order in July 2004 that addressed the question of the proper classification of Kohl's new duties, Respondents revised the underlying classification structure and, in October, reallocated her position to a classification that fell within the Career Executive program. Then in 2005, DATCP again reassigned Kohl within the Career Executive program. This time she was reassigned to where she started, i.e. as Deputy Administrator of the Division of Food Safety. According to Respondents' motion, the appropriate remedy in the 2002 action was to reject the Career Executive reassignment. Respondents further contend that as a consequence of the intervening events, the only remedies that Kohl might have obtained from the Commission have already been provided to her; she has been reassigned to her pre-2002 duties and she has not suffered any loss of pay.

In a motion for summary judgment, the non-moving party "may not rest upon mere allegations, mere denials or speculation to dispute a fact properly supported by the moving party's submissions. If the non-moving party has the ultimate burden of proof on the claim in question, that ultimate burden remains with that party in the context of the summary judgment motion." DOC & DER (SCOTT), *ibid.* DATCP's motion is unusual in that it was filed after an administrative hearing and after the Commission rendered its (interim) decision but before a hearing on remedy requested by the Appellant. The burden of proof at the remedial stage is on the Appellant. WARREN V. DHSS, CASE NOS. 92-0750-PC & 92-0234-PC-ER (PERS. COMM. 5/14/96). Appellant merely contends that she has a right to have the Commission determine whether the "transactions and processes" following the Commission's interim order of July 2004 were lawful.

Under these circumstances, the Commission is unable to ascertain a genuine dispute of material fact. Given the procedural background of this case, the Appellant's ultimate burden to establish she is entitled to a particular remedy, and her failure to identify any remedy not already provided her, the Commission finds that a hearing is unnecessary in this matter and grants DATCP's motion.

This result is consistent with applicable precedent. The question of remedy in a successful appeal of an involuntary demotion under Sec. 230.44(1)(c), Stats., was addressed in WARREN V. DHSS, CASE NOS. 92-0750-PC & 92-0234-PC-ER (PERS. COMM. 5/14/96).<sup>4</sup> There, DHSS did not dispute liability as to Ms. Warren's claim that she had been demoted from her Program Assistant Supervisor 2 (PA Sup 2) position in the Telephone Support Unit (TSU) of DHSS's Disability Determination Bureau to a PA 2 position outside the unit but still in the same bureau. A few months after the demotion, the agency reorganized the bureau by merging the TSU with the Consultative Exam Unit (CEU) where Ms. Smith had served as the supervisor for the Program Assistant positions. DHSS assigned Ms. Smith the responsibility

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<sup>4</sup> Ms. Warren also filed a complaint under the Wisconsin Fair Employment Act relating to the same transaction. The Personnel Commission which, prior to the July 2003 effective date of 2003 Wis. Act 33, had the authority to review both of Ms. Warren's claims, held a consolidated hearing on the remedy issue. Those portions of the DHSS (WARREN) decision addressing the discrimination claim are irrelevant to Ms. Kohl's appeal.



of serving as the sole PA Sup for the combined units. The reorganization also eliminated Warren's PA Sup 2 position and recreated it as a Financial Specialist Supervisor 3 position in another unit. Ms. Warren sustained her burden of establishing that she was entitled to back pay, but she failed to show she was entitled to be restored to the PA Sup 2 position in the TSU from which she was demoted. The current version of the statutory provisions that served as the basis for the WARREN analysis read:

Sec. 230.43(4) RIGHTS OF EMPLOYEE. If an employee has been removed, demoted or reclassified, from or in any position or employment in contravention or violation of this subchapter, and has been restored to such position or employment by order of the commission or any court upon review, the employee shall be entitled to compensation therefor from the date of such unlawful removal, demotion or reclassification at the rate to which he or she would have been entitled by law but for such unlawful removal, demotion or classification. Interim earnings or amounts earnable with reasonable diligence by the employee shall operate to reduce back pay otherwise allowable. Amounts received by the employee as unemployment benefits or welfare payments shall not reduce the back pay otherwise allowable, but shall be withheld from the employee and immediately paid to the unemployment reserve fund or, in the case of a welfare payment, to the welfare agency making such payment. The employee shall be entitled to an order of mandamus to enforce the payment or other provisions of such order.

Sec. 230.44(4)(c): After conducting a hearing or arbitration on an appeal under this section, the commission or the arbitrator shall either affirm, modify or reject the action which is the subject of the appeal. If the commission or arbitrator rejects or modifies the action, the commission may issue an enforceable order to remand the matter to the person taking the action for action in accordance with the decision. Any action brought against the person who is subject to the order for failure to comply with the order shall be brought and served within 60 days after the date of service of the decision of the commission or the arbitrator.

230.44(4)(d): The commission may not remove an incumbent or delay the appointment process as a remedy to a successful appeal under this section unless there is a showing of obstruction or falsification as enumerated in s. 230.43(1).

The WARREN decision offers the following analysis of these provisions:

The statutory scheme presented here provides for the restoration of an improperly demoted employee to her former position, and provides that this restoration shall not result in the removal of an incumbent absent a showing of obstruction or falsification.

[Appellant] does not allege obstruction or falsification here. [Appellant] does argue, however, that restoring [her] to the TSU/CEU supervisor position would not actually result in the removal of an incumbent since Ms. Smith would have rights to other positions in state service. This interpretation ignores the clear language of Sec. 230.44(4)(d), Stats., i.e., Ms. Smith is the incumbent of the TSU/CEU supervisor position and restoration of [Appellant] to that position would result in [Smith's] removal.

[Appellant's] argument that she is entitled to restoration to the TSU/CEU position because she is entitled to restoration to her former position also ignores the fact that the TSU/CEU supervisor position is not her former position, i.e., [Appellant's] former TSU supervisor position was eliminated, the authorization for this position was transferred to another unit, the duties of this position were assigned to the TSU/CEU supervisor position, and these TSU duties comprised only a portion of the duties of this TSU/CEU supervisor position.

Since Sec. 230.44(4)(d), Stats., operates to prevent the restoration of [Appellant] to the TSU/CEU supervisory position here, the question becomes one of determining to what position or type of position [Appellant] has a right to be restored. The term "restoration" is defined in the Wisconsin Administrative Code as follows:

ER-MRS 1.02(30) "Restoration means the act of mandatory reappointment without competition of an employee or former employee . . . 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.

It is undisputed that [Appellant] was offered appointment to a PA Sup 2 position in Support Unit 3 of the DDB on October 7, 1994. The record here shows that, not only is the position which [Appellant] was offered in October of 1994 in the same classification as the position from which she was demoted, but also that the nature of the support duties assigned to these positions [is] equivalent. The Commission concludes as a result that an appropriate remedy in this appeal is the appointment of [Appellant] to the vacant PA Sup 2 position offered to her by respondent on October 7, 1994.

The relevant facts in WARREN were analogous to those in the present matter prior to the point in 2005 at which Ms. Kohl was reassigned to her original position as Deputy Administrator of the Division of Food Safety. Now that she is again serving as Deputy Administrator of the Division, and given that there was no loss of pay in the interim, the Commission would lack the authority to grant some additional remedy to Kohl.

Except for the pending request for fees and costs under Sec. 227.485, Stats., the Respondent's motion for summary judgment on the question of remedy in Kohl I is granted. The procedure for addressing that topic will be set forth in a cover letter to this Ruling.

### **Kohl III**

In her August 25, 2005 appeal, Ms. Kohl seeks to again obtain review of her reassignment in 2002 as well as the reallocation of her position in 2004. Respondent contends that the appeal is untimely.

As provided in Sec. 230.43(3), Stats., State civil service appeals filed under Sec. 230.44, Stats., must be received within 30 days of either the effective date or the date of notification, whichever is later. Ms. Kohl's most recent appeal was received well outside the 30-day period and must be considered untimely. In addition, the Commission notes that to the extent Kohl seeks to use Kohl III to obtain review of the 2002 reassignment, that matter was the subject of Kohl I. In addition, the 2004 reallocation decision was the subject of Kohl II, which she previously withdrew.

DATCP's motion to dismiss Kohl III as untimely filed must be granted.

Dated at Madison, Wisconsin, this 5<sup>th</sup> day of January, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Paul Gordon /s/

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Paul Gordon, Commissioner

Susan J. M. Bauman /s/

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Susan J. M. Bauman, Commissioner

Chairperson Judith Neumann did not participate.

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