

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RICHARD G. DEMOYA, Appellant,

v.

Secretary, WISCONSIN DEPARTMENT OF VETERANS AFFAIRS, Respondent.

Case 3
No. 65270
PA(adv)-87

Decision No. 31636

RICHARD G. DEMOYA, Appellant,

v.

Secretary, WISCONSIN DEPARTMENT OF VETERANS AFFAIRS, Respondent.

Case 4
No. 65324
PA(adv)-88

Decision No. 31637

Appearances

Thomas E. Hayes, Attorney, Suite 3032, 161 West Wisconsin Avenue, Milwaukee, Wisconsin 53203-2602, appearing on behalf of Appellant.

John Rosinski, Chief Legal Counsel, P.O. Box 7843, Madison, Wisconsin 53707-7843, appearing on behalf of the Department of Veterans Affairs.

ORDER GRANTING MOTIONS TO DISMISS

These matters are before the Wisconsin Employment Relations Commission on Respondent's motions to dismiss one appeal as well as one of the claims in a second appeal. The final date for submitting written arguments was February 6, 2006.

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In order to more readily differentiate between Mr. deMoya's two appeals, the Commission will refer to No. 65270 as "deMoya I" and No. 65324 as "deMoya II." Respondent seeks dismissal of the claim in deMoya I arising from the action of making a Career Executive assignment to Appellant on July 12, 2005, and dismissal of deMoya II which arises from Respondent's actions on July 12 and October 21, 2005 to relocate and downsize the Appellant's office.

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

FINDINGS OF FACT¹

1. Prior to July 2005, Richard deMoya, the Appellant, served as Administrator of Respondent's Division of Veterans Services. He was a Career Executive employee in a position classified as Administrative Manager and was headquartered in Madison. He occupied a private office on the 7th floor of a building at 30 West Mifflin Street.

2. By letter dated July 12, 2005, Respondent informed Mr. deMoya that he had been given a

career executive temporary assignment to the special project of Supermarket planning and implementation. . . .

This career executive temporary assignment is in accordance with ER 30.085, Administrative Code which states: "A career executive employee may be assigned to a position for employee development purposes or to complete a special project for a duration not to exceed four (4) years."

In this temporary assignment, you will continue to receive a pay rate of \$43.064 per hour

Respondent also directed deMoya to move to a smaller private office (130 square feet) on the 9th floor of the same building by the end of the July 12th workday.

3. On September 26, 2005 Respondent informed deMoya that he was being reassigned to a career executive position at the Wisconsin Veterans Home in Waupaca County, to be effective October 10, 2005. As of the date of this ruling, this reassignment has not gone into effect.

¹ These findings are made solely for the purpose of deciding Respondent's motions.

4. In a letter dated September 30, 2005, Mr. deMoya submitted his resignation, to be effective 8-months hence:

The purpose of this letter is to submit my resignation from my position as Administrator, Division of Veterans Services effective June 1, 2006.

I tender my resignation contingent upon the following conditions for which we agreed.

1) My stabilization in my current classification and duty location through the effective date.

2) The use or payout of all vacation and sabbatical time by the effective date so that no service extends past the effective date.

5. Respondent informed deMoya on October 21 that his work area for the supermarket planning and implementation project was being moved to an open cubicle on the 8th floor that was smaller than the 9th floor private office. DeMoya moved to the new location on October 24.

6. Appellant filed a letter of appeal (deMoya I) with the Commission on October 28, 2005 in which he contended that he was constructively discharged:

In accordance with ER-MRS 30.10(2), the purpose of this letter is to appeal the personnel action in which the Secretary of the Wisconsin Department of Veterans Affairs coerced my resignation through an unreasonable reassignment directive. I believe that this action was an improper exercise of an appointing authority's discretion. I have permanent status in the career executive program.

On July 12, 2005, Secretary John Scocos temporarily assigned me to the special project of 'Supermarket Planning and Implementation' under the provisions of ER 30.085. . . .

It is important to note that since July 12, 2006 (and after the 30 day window in which I could have appealed the temporary assignment to the WERC, Secretary Scocos has informed other parties that the temporary assignment to a special project was less about a critical mission of the agency than it was a punitive action for which I was not afforded due process. Once I learned of the actual reason for my temporary assignment, I voiced my concerns to agency managers which I believe resulted in the retaliatory response of a career executive reassignment.

On September 26, 2005 my supervisor, Deputy Secretary Bill Kloster, came to my office and advised me that the agency was reassigning me to a career executive position in Waupaca County under the provisions of ER-MRS 30.07 and that the assignment would be effective three weeks later on October 10, 2005. . . .

I believe that all parties knew I was not qualified for the position; that my special project was immaterial . . . and that the desire of Secretary Scocos was to coerce my resignation. . . .

[I]n lieu of immediate resignation [sic] for declining the reassignment, I submitted my resignation on September 30, 2005 which was quickly accepted.

7. Appellant filed a second letter of appeal (deMoya II) with the Commission on November 3, 2005. The appeal related to the change in the location of his office. The letter read, in part:

The purpose of this letter is to appeal the action in which the Secretary of the Wisconsin Department of Veterans Affairs moved my office space from a 'constructed' (closed-door private) office to an open office (cubicle) in violation of the Department of Administration 'Space Allocation By Position Policy.'

On July 12, 2005, Secretary John Scocos temporarily assigned me to the special project of 'Supermarket Planning and Implementation; . . . [the] moved me from [the 7th floor office] to a smaller closed-door, private office on the 9th floor of 30 West Mifflin Street. . . .

I could have simply accomplished my special project from my 7th floor office. As I was unaware of my appeal rights with the WERC at the time, I allowed 30 days to pass without exercising those rights.

On October 21, 2005, Deputy Secretary Bill Kloster advised me by email that in approximately five work-hours, he was having my work area moved to an open cubicle on yet another floor (the [8]th floor) at 30 West Mifflin Street. That work area is 81 square feet in size and in an area trafficked by a number of employees traveling to the break area and restrooms. . . .

I believe that the directive to move from my closed-door office space was not in consonance with DOA Space Allocation Guidelines [of 192 square feet for a Division Administrator] and was accomplished to further humiliate me within my agency and for punitive reasons which are not clear to me.

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 of establishing that his claims fall within the scope of the Commission's subject matter jurisdiction and were timely filed.
2. The Appellant has failed to sustain that burden.
3. The Commission lacks subject matter jurisdiction over Appellant's claim in Case No. 65270 (deMoya I) arising from the July 12, 2005 personnel action.
4. The Commission lacks subject matter jurisdiction in Case No. 65324 (deMoya II).

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

ORDER

Respondent's motions are granted, deMoya II is dismissed and deMoya I will continue only as to Appellant's claims that he was constructively discharged and that his September 26, 2005 reassignment was an unreasonable and improper exercise of discretion.

Given under our hands and seal at the City of Madison, Wisconsin, this 7th day of March, 2006.

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

Department of Veterans Affairs (deMoya I and II)

MEMORANDUM ACCOMPANYING
ORDER GRANTING MOTIONS TO DISMISS

These matters are before the Commission on motions to dismiss one aspect of Mr. deMoya's first appeal and all of his second appeal.

I. deMoya I

The Commission convened a prehearing conference with the parties on December 21, 2005. Appellant proposed the following as an issue² in deMoya I:

- a) Whether Respondent's action on July 12, 2005, of temporarily assigning Appellant to work on a special project under ER 30.085, was an unreasonable and improper exercise of discretion.

In correspondence dated January 6, 2006, Appellant offered additional information relating to the nature of his claim:

Appellant does intend to contest that the temporary assignment was to work on a "special project," as opposed to "from one career executive position to another." "Supermarket planning and implementation" was *a part of* appellant's duties since 2000; it was not a "special project." [Emphasis added.]

Respondent has raised jurisdictional and a timeliness objections to this claim. More specifically, Respondent contends the Commission lacks subject matter jurisdiction over the temporary assignment of a career executive and that the appeal was not filed within 30 days of the personnel action that is the subject of the claim.

Rules promulgated under the authority of the Director of the Office of State Employment Relations include ER 30.085, Wis. Adm. Code, entitled "Career executive temporary assignment," which provides:

A career executive employee may be assigned to a position for employee development purposes or to complete a special project for a duration not to exceed 4 years.

² The Commission has scheduled for hearing in deMoya I on two other issues that are not the subject of Respondent's motion.

In contrast, Sec. ER-MRS 30.07(1), Wis. Adm. Code, has been issued by the Administrator of the Division of Merit Recruitment and Selection. It provides:

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. [Emphasis added.]

In ER-MRS 30.10 the Administrator's rules proceed to distinguish career executive positions from other positions in terms of the opportunity for obtaining review of certain employment transactions:

(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 Wisconsin Employment Relations 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.

Respondent denominated Mr. deMoya's July 12th assignment as temporary (as described in Sec. ER 30.085) rather than permanent (as described in Sec. ER-MRS 30.07(1) and referenced in Sec. ER-MRS 30.10). The July 12th letter also identified the work as a "special project." Appellant contends that "Supermarket planning and implementation" does not fall within the scope of a "special project" because the subject of the project had, since 2000, been one aspect of his overall responsibilities as Division Administrator for the Division of Veterans Services. However, nothing in Sec. ER 30.085 limits a "special project" to something that is an entirely new subject matter for the career executive. The Appellant has also failed to supply any basis for his restrictive interpretation of a "special project" or for concluding that the reassignment was the *permanent* appointment to a different career executive position. Consequently the Commission lacks the authority to review the transaction as a permanent reassignment as provided in Sec. ER-MRS 30.10(2).

Appellant also contends that the matter may be reviewed by the Commission in its role as the "final step arbiter in the state employee grievance procedure established under s. 230.04(14)" as provided in Sec. 230.45(1)(c), Stats. The contention ignores the

administrative rules relating to the non-contractual grievance procedure set forth in Ch. ER 46, Wis. Adm. Code, which require a third-step decision by the appointing authority or designee before the matter can proceed to the Commission.³ In its Reply Brief, Respondent states that Mr. deMoya had “not filed any grievance with the employer relating to the temporary assignment.” In the absence of a decision on the grievance at the third step, deMoya had nothing to appeal to the final step arbiter.⁴

Finally, Appellant contends that the Commission may review the July 12th assignment as part of its authority under Sec. 230.44(1)(d), Stats., to review a “personnel action after certification which is related to the hiring process in the classified service.” A work assignment occurring at least 11 years after Appellant began working in the career executive Division Administrator position is not related to the hiring process for the purpose of obtaining review of the assignment. *ROBERTS V. DHSS & DP*, CASE NO. 81-44-PC (PERS. COMM. 7/27/81) (the Commission lacks jurisdiction over an appeal arising from alleged reassignments of duties and responsibilities of appellant’s position); *KIENBAUM V. UW*, CASE NO. 79-246-PC (PERS. COMM. 4/25/80) (there is no statutory basis for an appeal to the Commission of the assignment of job duties to an employee by the employing agency); *ASCHE V. DOC*, CASE NO. 90-0159-PC, 5/21/97) (the reassignment of appellant, a supervisor, from the security unit at the University of Wisconsin Hospital and Clinics to the Oakhill Correctional Institution is not a personnel action “after certification which is related to the hiring process”).

Because the July 12th assignment does not fall within the scope of any of these provisions, the claim must be dismissed for lack of subject matter jurisdiction.⁵

³ The parties can mutually agree to waive steps in the grievance process but there is no indication a waiver occurred here.

⁴ In addition, reassignment is a management right pursuant to Sec. ER 46.04(2), Wis. Adm. Code, so it is not subject to the non-contractual grievance procedure. *RAMSDEN V. DHSS*, CASE NO. 92-0826-PC (PERS. COMM. 2/25/93).

⁵ While it is unnecessary to the resolution of this matter, Respondent also takes the position that the October 28, 2005 letter of appeal was untimely with respect to the July 12th reassignment. In light of our conclusion regarding subject matter jurisdiction, it is unnecessary for the Commission to formally address the timeliness argument. However, we note that Mr. deMoya has the burden of establishing that his appeal was timely filed. *UW & OSER(KLINE)*, DEC. NO. 30818 (WERC, 3/04). The time limit cited by both parties is found in Sec. 230.44(3), Stats., which reads, in part:

Any appeal filed under this section may not be heard unless the appeal is filed within 30 days after the effective date of the action, or within 30 days after the appellant is notified of the action, whichever is later.

Appellant’s sole argument is that even though he learned of the reassignment on the same day it became effective in July, he “did not learn about the actual reason” until the Respondent informed him in September that he was about to be reassigned again, but on a permanent basis, to a career executive position at the Wisconsin Veterans Home at King. Determination of the timeliness of an appeal filed under Sec. 230.44, Stats., is based on the effective date and the date of notification of the action, and not on the date the employee concludes (or has reason to conclude) that the transaction was improper. *DOR (WILLIAMS)*, DEC. NO. 31566 (WERC 12/05).

II. deMoya II

This appeal, filed on November 3, 2005, arises from Respondent's actions on July 12 and October 21, 2005 to relocate and downsize Mr. deMoya's office within a building at 30 West Mifflin Street in Madison. Respondent has moved to dismiss for lack of subject matter jurisdiction.

Appellant's sole argument opposing Respondent's motion is that the appeal is before the Commission pursuant to Sec. 230.45(1)(c), Stats., as part of the grievance procedure. As already noted, the administrative rules relating to the non-contractual grievance procedure are set forth in Ch. ER 46, Wis. Adm. Code, and require a third-step decision by the appointing authority or designee before the matter can proceed to the Commission. Appellant does not contest Respondent's assertion that Mr. deMoya never initiated the grievance process with his employer before filing his appeal. Because there has been no decision at the third step, deMoya has nothing to appeal to the final step arbiter (the Commission).

For the above reasons, the Respondent's motions to dismiss must be granted. Further proceedings in Case No. 65270 will be limited to the following issues:

- b) Whether Appellant's resignation tendered on September 30, 2005, was a constructive discharge.
- c) Whether Respondent's action on September 26, 2005, informing Appellant that he would be reassigned to a career executive position in King, Wisconsin, was an unreasonable and improper exercise of discretion.

Dated at Madison, Wisconsin, this 7th day of March, 2006.

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

