

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JAMES S. THIEL, Appellant,

v.

**Secretary, WISCONSIN DEPARTMENT OF TRANSPORTATION, Director,
OFFICE OF STATE EMPLOYMENT RELATIONS, and Administrator,
DIVISION OF MERIT RECRUITMENT AND SELECTION, Respondents.**

Case 663
No. 64379
PA(dmrs)-5

Decision No. 31725

JAMES S. THIEL, Appellant,

v.

**Secretary, WISCONSIN DEPARTMENT OF TRANSPORTATION, Director,
OFFICE OF STATE EMPLOYMENT RELATIONS, and Administrator,
DIVISION OF MERIT RECRUITMENT AND SELECTION, Respondents.**

Case 18
No. 65169
PA(sel)-25

Decision No. 31726

Appearances:

Timothy Edwards, Edwards Law Offices, 210 North Bassett Street, Suite 110, Madison, Wisconsin, 53703, appearing on behalf of James S. Thiel.

David J. Vergeront, Chief Legal Counsel, P. O. Box 7855, Madison, WI 53707-7855, appearing on behalf of the Office of State Employment Relations (OSER) and the Division of Merit Recruitment and Selection (DMRS).

Lester A. Pines, Cullen Weston Pines & Bach, 122 West Washington Avenue, Suite 900, Madison, Wisconsin, 53703, appearing on behalf of the Department of Transportation (DOT).

ORDER GRANTING MOTION TO DISMISS

PARTIES

These matters are before the Wisconsin Employment Relations Commission (the Commission) on a motion for summary judgment and/or to dismiss that was filed by Respondents OSER (the Director of the Office of State Employment Relations) and DMRS (the Division of Merit Recruitment and Selection). The final date for submitting written arguments was June 16, 2006.

Dec. No. 31725
Dec. No. 31726

During a telephone conference held on October 25, 2005, the Appellant confirmed that he was advancing four claims in THIEL I and two claims in THIEL II:

THIEL I

1. Whether DOT's action of removing the Appellant from his Attorney-Management position/classification in December 2004 and placing him in an Attorney-Supervisor position/classification constituted a demotion, constructive or otherwise, and if so, whether there was just cause for the action. (Asserted jurisdictional basis is Sec. 230.44(1)(c), Stats.)
2. Whether DOT's action of removing the Appellant from his Attorney-Management position/classification and placing him in an Attorney-Supervisor position/classification was illegal or an abuse of discretion. (Asserted jurisdictional basis is Sec. 230.44(1)(d), Stats.)
3. Whether DMRS's action of allegedly removing the Appellant from his Attorney-Management position/classification and placing him in an Attorney-Supervisor position/classification was illegal or an abuse of discretion. (Asserted jurisdictional basis is Sec. 230.44(1)(a), Stats.)
4. Whether the decision to approve classification of the Appellant's new collection of duties at the Attorney-Supervisor level, rather than [Appellant to identify one or more existing classifications that he believes better described his new collection of duties] was correct. (Asserted jurisdictional basis is Sec. 230.44(1)(b), Stats.)

THIEL II

5. Whether the inclusion of the name of Robert Jambois on the certification list for the vacant General Counsel position was contrary to the civil service code (i.e., subch. II, ch. 230, Stats., and the administrative rules issued thereunder.) (Asserted jurisdictional basis is Sec. 230.44(1)(a), Stats.)
6. Whether DOT's decision not to select the Appellant for the position of General Counsel in August/September 2005 was illegal or an abuse of discretion. This claim includes the contention that the DOT violated the prohibition against discrimination in the hiring process based on political affiliations. (Sec. 230.18, Stats.) (Asserted jurisdictional basis is Sec. 230.44(1)(d), Stats.)

He subsequently withdrew claim 4 in THIEL I.

The motion for summary judgment or dismissal relates only to issues 3 (THIEL I) and 5 (THIEL II), which are the only contentions involving either DMRS or OSER. If granted, the pending motion would have the effect of dismissing both DMRS and OSER as Respondents in the two cases. The remaining issues, all of which involve alleged actions attributable to DOT, are unaffected by the motion.

In his final written argument relating to the pending motion, Appellant effectively recast his third claim so that it refers to an alleged action by OSER rather than DMRS, with jurisdiction premised on Sec. 230.44(1)(b), Stats.

The Commission makes and issues the following

FINDINGS OF FACT¹

1. Prior to December 13, 2004, Appellant James Thiel served as Chief Counsel² for DOT with the classification of Attorney-Management. The operative position description described the objectives of the position as:

- A. Provides legal advice and counsel to the Secretary of Transportation, Office of the Governor, their staff and other federal, state and local officials in matters relating to transportation.
- B. Represents the Secretary of Transportation and Department of Transportation in legal proceedings and matters affecting transportation.
- C. Supervises the Office of [General Counsel] and its activities.
- D. Represents the Secretary of Transportation and Governor publicly in transportation matters.

Appellant held permanent status in class, reported to the DOT Secretary and filled position number 033632.

2. At all relevant times, Joseph Maassen served as DOT's Deputy General Counsel.

¹ The findings set out below are made solely for the purpose of ruling on the pending motions.

² The working title for this set of responsibilities is variously referred to as Chief Legal Counsel, Chief Counsel and General Counsel and those terms are used interchangeably for the purpose of this ruling.

3. By letter dated December 13, 2004 from the DOT Secretary, Appellant was informed that:

Effective immediately you will be temporarily reassigned to focus on high-level attorney assignments for the Department. I have decided that during this time you will not serve as Chief Legal Counsel so you can focus on other critical activities.

You will report to [Deputy Secretary] Ruben L. Anthony, Jr. Your classification, pay and other rights will not be affected through this temporary reassignment. Your office location will also remain the same at this time.

4. On or about December 16, 2004, DOT supplied OSER with a copy of a new position description for position number 033632, that identified the position as “a supervisor” in the Office of General Counsel with responsibility to assist the “office of the Secretary and Chief Legal Counsel with planning, operations, and staffing of the functions and responsibilities of the Office of General Counsel.” DOT asked OSER to confirm DOT’s determination that the classification for the duties described in the position were best identified at the Attorney-Supervisor level. On or about December 16, OSER concluded that the Attorney-Supervisor classification was the best fit.³

5. By letter dated December 17, 2004 but delivered to the Appellant on December 21, Deputy Secretary Anthony informed the Appellant, in part:

This is to confirm your reassignment to the position of Attorney – Supervisor with the Department of Transportation, Office of General Counsel effective December 20, 2004. You will continue to report to Ruben Anthony Jr. for assignment of your new duties and responsibilities.

Your pay upon reassignment will remain the same. . . . You will not be required to serve a probationary period and will attain permanent status immediately.

Appellant also received a new organization chart for the Office that showed him occupying position 033632 that was assigned to the Attorney – Supervisor classification (with three subordinate attorney positions) and reported to a vacant “Chief of Legal Counsel” position that did not have a position number assigned to it. Appellant continued to occupy position 033632 but the classification of that position was changed to Attorney – Supervisor. The same chart showed Mr. Maassen in a separate Attorney - Supervisor position with eight subordinate positions, including four attorneys. The Maassen position was also depicted as reporting to the vacant Chief of Legal Counsel position.

³ There appears to be no dispute that the Attorney-Supervisor and Attorney-Management classifications are assigned to the same pay range.

6. By letter dated December 20, the DOT Secretary informed Mr. Maassen:

I am temporarily assigning you to serve as the primary contact for my office in coordinating legal services for the Department of Transportation. You will report to Ruben Anthony Jr. Your classification, pay and other rights will not be affected through this temporary assignment.

7. During the morning of Tuesday, December 21, 2004, the Director of the WisDOT Bureau of Human Resources informed Mr. Thiel that the new General Counsel position description “. . . has not been approved by OSER . . so I can get back to you as soon as we get it back.”

8. Mr. Thiel filed his initial appeal (THIEL I) with the WERC on January 6, 2005. The letter raised various claims regarding DOT and included the following statement:

To the extent the action taken against James S. Thiel includes a position classification decision or other approval under Chapter 230 attributable to or delegated by the Director of the Office of State Employment Relations, this appeal is also taken under Wis. Stat. 230.44(1)(b). A \$50 filing fee is enclosed.

To the extent the action taken against James S. Thiel includes a direct or delegated personnel decision of the Administrator of the Division of Merit Recruitment and Selection regarding the principles of the classified civil service system, the merit recruitment and selection process and other duties of the Administrator under Chapter 230, this appeal is also taken under Wis. State. 230.44(1)(a). A separate \$50 filing fee is enclosed.

9. A job announcement was issued on a later date for the DOT Chief Legal Counsel position, which was classified at the Attorney – Management level.

10. On or before March 8, 2005, Appellant made a public records request to DOT for the names of the candidates for the Chief Legal Counsel position. DOT provided the names of transfer candidates but no formal certification for the position had been issued at that time. Robert Jambois was not one of the transfer candidates. Appellant agreed DOT could provide him with the certification list at a later date.

11. The final day for submitting application materials for the Chief Legal Counsel position was May 23, 2005.

12. In response to his outstanding request and between approximately July 8 and July 11, 2005, DOT provided Mr. Thiel with a copy of the certification list for the Chief Counsel position. The list identified ten certified candidates, but did not include Robert Jambois.

13. The certification list was amended on July 21, 2005 to include Mr. Jambois.
14. DOT conducted a first round of interviews on July 26 and 28, 2005. Both Mr. Jambois and Appellant were interviewed at that time and the Appellant knew that Mr. Jambois had been interviewed.
15. By an e-mail dated August 4, 2005 that was sent to Appellant and to other DOT staff attorneys, Appellant was notified that he and Bob Jambois were two of the candidates scheduled for another round of interviews on August 22.
16. DOT conducted the second round of interviews on August 22. Once again, both Mr. Jambois and Appellant were interviewed.
17. DOT subsequently hired Mr. Jambois for the position of Chief Legal Counsel. He filled position number 024876. The previous incumbent for the position assigned that number was a DOT staff attorney who had recently retired.
18. Appellant filed his second appeal (THIEL II) with the Commission on September 22, 2005. The appeal provided, in relevant part, as follows:

This is an appeal of a personnel action after certification which is related to the hiring process in the classified civil service and is illegal or an abuse of discretion pursuant to Wis. Stat. 230.44(1)(d).

This appeal is related to the pending January 6, 2005 appeal . . . involving the action taken against . . . James S. Thiel . . . in the form of removal from this position, a punitive, sham reassignment, and the recruitment and hiring process to fill the same position from which I was removed. . . .

The entire sequence of events and actions taken to remove me from the position and fill the position show an obstruction or falsification of the classified civil service recruitment and selection process as enumerated in Wis. Stat. 230.43(1).

. . .

The entire process of removal, demotion, recreation of the same position, and the process leading to the appointment of Mr. Jambois are illegal and an abuse of discretion.

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 the Commission has subject matter jurisdiction over his claims regarding DMRS and OSER, and that his appeal was timely filed in accordance with the 30-day time limit established in Sec. 230.44(3), Stats., with respect to those claims.

2. The Appellant has failed to establish subject matter jurisdiction over claims against either DMRS or OSER in THIEL I.

3. The Appellant has failed to show that THIEL II was timely filed as an appeal of the DMRS certification action.

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

ORDER

DMRS and OSER are dismissed as parties in these matters. The Commission will contact the remaining parties for the purpose of scheduling a status conference.

Given under our hands and seal at the City of Madison, Wisconsin, this 27th day of June, 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

DOT, DMRS & OSER (Thiel I and II)

**MEMORANDUM ACCOMPANYING
RULING GRANTING MOTION TO DISMISS**

PARTIES

These matters are before the Commission on what amounts to a request to dismiss DMRS and OSER as parties, although the request is denominated as “Motions for Summary Judgment and/or to Dismiss.” As already noted, the pending motions relate to only one of the proposed issues in each of the two appeals and Respondent DOT has not raised an objection to the remaining issues.

A. THIEL I

The pending motion addresses the following proposed issue in THIEL I:

3. Whether DMRS’s action of allegedly removing the Appellant from his Attorney-Management position/classification and placing him in an Attorney-Supervisor position/classification was illegal or an abuse of discretion.

As noted in the conference report setting forth the proposed issues, Appellant initially asserted that the jurisdictional basis for his claim was Sec. 230.44(1)(a), Stats. That provision reads:

(1) Appealable actions and steps. Except as provided in par. (e), the following are actions appealable to the commission under s. 230.45(1)(a):

(a) Decision made or delegated by administrator [of the Division of Merit Recruitment and Selection]. Appeal of a personnel decision under this subchapter made by the administrator or by an appointing authority under authority delegated by the administrator under s. 230.05(2).

Appellant’s initial brief on the pending motion appeared to be inconsistent with a claim relating to a decision by the Administrator under Sec. 230.44(1)(a) and instead focused on one or more actions allegedly taken by OSER. The Commission sought clarification from the Appellant. In his final submission, Appellant indicated he was pursuing a claim against OSER rather than DMRS and contended the Commission had jurisdiction over the claim pursuant to Sec. 230.44(1)(b), Stats., which reads:

(b) Decision made or delegated by director. 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).

Appellant proceeded to attempt to differentiate this claim from Claim 4, which he had previously withdrawn:

The original proposed issue number four was too narrowly worded and concentrated on whether the duties, responsibilities and authorities in Mr. Thiel's new position description as Attorney Supervisor should have been more properly classified in one or more other existing classifications that better described his new collection of duties. It went on [to] direct that Mr. Thiel identify those classifications. The point is, however, the new position description is not improperly classified, but is part of a punitive demotional scheme, and the entire three simultaneous actions involved, when viewed as a whole, and approved by OSER, is a decision appealable under Wis. Stat. 230.44(1)(b).

The motion by OSER and DMRS in THIEL I is premised on the argument that Appellant is not seeking to pursue a claim against either agency that falls within the scope of the Commission's jurisdiction under Sec. 230.44, Stats.⁴ Appellant's jurisdictional arguments must be assessed in the context of how Wisconsin's civil service law, found in subch. I and II of ch. 230, Stats., differentiates between the responsibilities of the Director of OSER, the appointing authority⁵ and the Administrator of DMRS. The relevant provisions read:

230.04 Powers and duties of the director [of OSER].

(1) The director is charged with the effective administration of this chapter. All powers and duties, necessary to that end, which are not exclusively vested by statute in the commission, the division of equal rights, the administrator or appointing authorities, are reserved to the director.

⁴ Appellant argues that the motion by OSER and DMRS must be denied because they did not file a formal answer in these matters, thereby placing all material allegations of the appeal in issue and requiring denial of the motion for summary judgment because summary judgment is only appropriate where there are no disputes of material fact. Appellant cites Sec. PC 3.05, Wis. Adm. Code, which provides that "Respondents *may* file written answers within 20 days after service of the appeal" and that "[i]f no answer is filed, every material allegation of the appeal is in issue." According to Appellant's argument, disputes of material fact must exist whenever there is no formal answer. The purpose of the cited administrative rule is to indicate that respondents are not required to file formal answers to Sec. 230.44 and .45 appeals and that the failure to file an answer does not constitute an admission of all the allegations in the letter of appeal. Respondents OSER and DMRS have submitted documentation that supports the findings of fact that are set forth in this ruling. In contrast, the Appellant has not offered any information, beyond making vague arguments to the effect that OSER/DMRS must have taken an action that falls within the Commission's jurisdiction, to show there is an *actual* dispute of material fact. While the Commission is reviewing Respondents' motion as jurisdictional and timeliness objections, we note that a party opposing a motion for summary judgment may not rely upon mere allegations, mere denials or speculation to dispute a fact properly supported by the moving party's submissions. DOA & OSER (SUTHEIMER) DEC. NO. 30932-A (WERC, 6/2004).

⁵ "Appointing authority" is defined in Sec. 230.03(4) as "the chief administrative officer of an agency unless another person is authorized to appoint subordinate staff in the agency by the constitution or statutes."

(1m) The director may delegate, in writing, any of his or her functions set forth in this chapter. . .

(5) The director shall promulgate rules on all matters relating to the administration of the office and the performance of the duties assigned to the director, except on matters relating to those provisions of subch. II for which responsibility is specifically charged to the administrator. . . .

230.05 Powers and duties of the administrator [of DMRS].

(1) All powers necessary for the effective administration of the duties specified for the administrator under this subchapter are reserved to the administrator.

(2) (a) Except as provided under par. (b), the administrator may delegate, in writing, any of his or her functions set forth in this subchapter to an appointing authority. . . .

(5) The administrator shall promulgate rules for the effective operation of the provisions of this subchapter for which responsibility is specifically charged to the administrator. . . .

(7) The administrator shall use techniques and procedures designed to certify eligible applicants to any vacant permanent position within 45 days after the filing of an appropriate request by an appointing authority. . . .

230.06 Powers and duties of appointing authorities.

(1) An appointing authority shall . . .

(b) Appoint persons to or remove persons from the classified service, discipline employees, designate their titles, *assign their duties* and fix their compensation, all subject to this subchapter and the rules prescribed thereunder.

(c) *Provide the director with current information relative to the assignment of duties to permanent classified positions in his or her agency.* . . .

230.09 Classification. (1) The director [of OSER] shall ascertain and record the duties, responsibilities and authorities of, and establish grade levels and classifications for, all positions in the classified service. . . .

(2) (a) After consultation with the appointing authorities, the director shall allocate each position in the classified service to an appropriate class on the basis of its duties, authority, responsibilities or other factors recognized in the job evaluation process. *The director may reclassify or reallocate positions on the same basis.* . . .

(c) If anticipated changes in program or organization will significantly affect the assignment of duties or responsibilities to positions, the appointing authority shall, whenever practicable, confer with the director within a reasonable time prior to the reorganization or changes in program to formulate methods to fill positions which are newly established or modified to the extent that reclassification of the position is appropriate. *In all cases, appointing*

authorities shall give written notice to the director and employee of changes in the assignment of duties or responsibilities to a position when the changes in assignment may affect the classification of the position.

(d) If after review of a filled position the director reclassifies or reallocates the position, the director shall determine whether the incumbent shall be regraded or whether the position shall be opened to other applicants. (Emphasis added.)

By statute, it is the appointing authority (here DOT) rather than either DMRS or OSER who assigns and reassigns duties to a particular position in the classified service.

There are only three limited categories of decisions attributable to OSER that may be reviewed by the Commission pursuant to the Commission's authority under Sec. 230.44(1)(b), Stats. The Appellant does not allege that OSER made a decision relating to personnel records pursuant to 230.13(1). Decisions pursuant to 230.09(2)(d) as to whether a position incumbent "should be regraded" after the incumbent's position has been either reclassified or reallocated may be reviewed by the Commission, but Mr. Thiel does not contend that his position should have been opened to competition once it had been reallocated from Attorney-Management to Attorney-Supervisor. The only remaining category of OSER decisions that fall within the scope of the Commission's jurisdiction under 230.44(1)(b) are decisions to allocate, reallocate or reclassify a position, as provided in 230.09(2)(a).

By letter dated May 4, 2006, the Commission offered the Appellant an additional opportunity to clarify his contentions:

If Appellant is seeking to pursue a claim . . . against OSER, please specify whether he is seeking review of the alleged action by OSER to establish, on or about December 16, 2004, the classification level for the new collection of duties assigned to position number 033632. If so, Appellant should identify one or more alternative classifications that he believes described better the new collection of duties or explain why he should not be required to do so. . . . If Appellant believes the Commission has jurisdiction over OSER in THIEL I but is not seeking review of a classification or regrade, please identify the alleged misconduct by OSER and explain how OSER's action falls within the scope of Sec. 230.09(2)(a) or (d).

In his responsive submission dated May 31, 2006, Appellant makes the following arguments:

Mr. Thiel is seeking to pursue a claim against OSER for its classification decision *or other approval* under Chapter 230 attributable to or delegated by the Director of [OSER] under Wis. Stat. 230.44(1)(b). There is only one

classification, Attorney 15.⁶ Within that classification there are three subdivisions; management, supervising, and confidential.⁷ OSER's role in approving the removal of Mr. Thiel from the Attorney 15 Management classification in charge of the Office of General Counsel is improper for two reasons.

First, the reclassification⁸ of Mr. Thiel to Attorney Supervisor was not based on a gradual change of duties, authority, responsibilities or other factors recognized in the job evaluation process under Wis. Stat. 230.09(2)(a), but was punitive on its face. Mr. Thiel was removed and demoted from his position for no other reason than punishment and OSER incorrectly approved it as part of the entire punitive scheme. Mr. Thiel should not be required to specify why his demotion is not aptly described in his new position description.

Second, OSER did not reclassify or reallocate the position Mr. Thiel filled as Attorney Management, General Counsel under Wis. Stat. 230.09(2)(d) after its review of the position, but rather approved the demotion of Mr. Thiel to Attorney Supervisor with substantially less authority, responsibility and duties. The entire scenario was punitive on its face and not properly based on an OSER review of . . . Mr. Thiel's then-current position as General Counsel.

In fact, as established in the appeal in Thiel I, at 10:43 A.M., Tuesday, December 21, 2004, the Director of the WisDOT Bureau of Human Resources informed Mr. Thiel that the new General Counsel position description “ . . . has not been approved by OSER . . . so I can get back to you as soon as we get it back.” It is clear that OSER had to make and did make an undelegated decision to remove and reclassify Mr. Thiel that was not properly based on any real change in duties, authorities and responsibilities based on any job evaluation process.

The term “reallocation” is defined in Sec. ER 3.01(2)(f) as a “logical” change in the duties and responsibilities of a position. In contrast, the reclassification of a position must be based on a “logical and gradual” change to the position's duties. Sec. ER 3.01(3). Therefore,

⁶ Contrary to Mr. Thiel's assertion, no “Attorney 15” classification existed in 2004.

⁷ The four distinct classifications of Attorney-Confidential, Attorney-Confidential/Supervisor, Attorney-Management and Attorney-Supervisor are described in one classification specification, but they are separate classifications. Prior to OSER's December 2004 action, Appellant was the incumbent in a position classified as Attorney-Management. After OSER's action, he was the incumbent in a position classified as Attorney-Supervisor.

⁸ The terms “reclassification” and “reallocation” have the distinct, though related, meanings set forth in ER 3.01(2) and (3). While Mr. Thiel refers to OSER's personnel action as a reclassification, the events make it clear that it was a reallocation.

Appellant's contention that the transaction was not gradual is irrelevant because Respondent has shown that it reallocated the Appellant's position from Attorney-Management to Attorney-Supervisor rather than reclassifying it. Mr. Thiel has no basis on which to obtain review of OSER's motivation for classifying the Appellant's new set of duties at the Attorney-Supervisor level except to the extent that motivation is relevant to the question of whether the Attorney-Supervisor class level best described his new duties.

This result is consistent with the conclusion that was reached in *ROBERTS v. DHSS & DP, CASE NO. 81-44-PC (PERS. COMM. 7/27/81)*. In *ROBERTS*, the appellant contended that her duties and responsibilities had been gradually eroded with the effect of dismantling her position. At the time, the Administrator of the Division of Personnel (DP) held a wide range of responsibilities relative to the State civil service, including the classification function. Ms. Roberts asked the DP administrator to review what was going on regarding her position and to take some action. Once the administrator determined that there had been no changes in duties that would affect the classification of the position, he declined to take further action on the matter. Ms. Roberts appealed the administrator's action but the appeal was dismissed for lack of subject matter jurisdiction:

Although unstated, it is reasonable to infer that the administrator's approach was based on the theory that his authority extended only to the question of the correct classification of the position, and not to any questions raised regarding the assignment or reassignment of duties by the appointing authority. This is consonant with the Commission's understanding of the law. The appellant has cited no authority, and the Commission is aware of none, which gives the Commission or the administrator authority with respect to the assignment of duties by the appointing authority.

The appellant, through counsel, asserts that the substantive issues presented by this appeal include the following:

1. Was the Administrator's decision that no changes in the duties and responsibilities of Roberts had occurred correct?
and
2. Regardless of the answer to the foregoing, were there in fact changes in Roberts' job duties and responsibilities which would affect its classification?
and
3. What was the motivation of those who reassigned and removed said job duties and responsibilities?"

As indicated above, the legal basis for the administrator's inquiry into whether there had been any changes in duties and responsibilities was solely in connection with the question of whether the position was correctly classified.

The issues quoted above which the appellant seeks to raise are not independently cognizable by either the administrator or this Commission. If it were determined that there have been appreciable changes in the position, the administrator could reclassify the position but has no power to require changes in those duties and responsibilities. The appellant has not complained that her position has been reclassified or is improperly classified at its current level. While it is possible that the Commission could consider the appellant's proposed issues as sub-issues related to a larger issue concerning the classification of her position, the Commission can only conclude based on her arguments and the nature of her appeals to the administrator that she is not raising an issue as to the correct classification of her position but rather is seeking to pursue the proposed issues independently.

Mr. Thiel has explicitly indicated he is not claiming there was a classification other than Attorney-Supervisor that better described his new collection of duties. For the same reasons as described in ROBERTS, the Commission lacks the authority to independently determine the motivation behind an OSER classification decision where Appellant does not dispute that the class level assigned by OSER was correct.

Appellant also contends that OSER approved "the demotion" decision. As noted in 230.06(1)(b), the authority to demote, i.e. discipline, an employee rests with the appointing authority, not OSER. Even if DOT was found to have demoted Mr. Thiel and OSER had been required to approve a demotion, OSER's action would not be one of the decisions described in 230.09(2)(a) or (d) as reviewable pursuant to the Commission's 230.44(1)(b) authority.

Finally, the December 21 statement by DOT's Human Resources Director that is referenced by Appellant was obviously a reference to the position description for the position to which those General Counsel responsibilities removed by DOT from Mr. Thiel's position (#033632) on December 13 *would be* assigned on a permanent basis.. The General Counsel duties were ultimately assigned to position 024876 which was the subject of the hiring process in 2005 and was filled by Mr. Jambois. The Commission has no reason to believe that the statement attributed to the Human Resources Director referred to Mr. Thiel's position rather than the position that was assuming the General Counsel responsibilities.

It is the Appellant's burden to establish that the Commission has subject matter jurisdiction over a claim against OSER. While OSER has submitted extensive documentary material showing that it acted to reallocate the Appellant's position, Mr. Thiel has indicated he does not contest whether the decision to reallocate his position from Attorney-Management to Attorney-Supervisor was correct. Appellant has been unable to identify or even articulate some other action by OSER that falls within the scope of Sec. 230.44(1)(b). Mr. Thiel has failed to identify any action by DMRS that is the subject of Thiel I. Therefore, the matter must be dismissed as to OSER as well as DMRS.

B. THIEL II

The pending motion by OSER and DMRS addresses the following proposed issue in THIEL II:

5. Whether the inclusion of the name of Robert Jambois on the certification list for the vacant General Counsel position was contrary to the civil service code (i.e., subch. II, ch. 230, Stats., and the administrative rules issued thereunder.) (Asserted jurisdictional basis is Sec. 230.44(1)(a), Stats.)

The authority to create a certification list is part of the examination process that is a statutory responsibility of DMRS as provided in Sec. 230.05(7), Stats.⁹

Among the objections advanced by DMRS to the proposed issue is that the claim was untimely filed. The relevant time limit for filing a classified service personnel appeal under Sec. 230.44, Stats., 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.

There is no dispute that the Commission received Appellant's second appeal on Thursday, September 22, 2005. In order for the appeal to be considered timely, the effective date or the date of notification of the underlying transaction must have occurred no earlier than August 23, 2005.

The transaction that is the subject of the claim is the inclusion of Mr. Jambois' name on the certification list for the position in question. As attachments to the motion to dismiss, DMRS supplied copies of two certification lists for the vacancy, one reflecting the list as of July 8, 2005 (which did not include Mr. Jambois) and the second dated July 21, 2005 (which did). Clearly the effective date of the action to include Mr. Jambois on the certification list occurred no later than July 21 which is substantially beyond the limits of the 30-day filing period.

It is somewhat more complicated to determine the date that Mr. Thiel was notified of the action to add Mr. Jambois to the certification list. Appellant learned of certain transfer applicants (not including Mr. Jambois) on March 8. By approximately July 11, Appellant received a copy of the original certification list and learned shortly thereafter that the list was not complete. Appellant does not dispute that by the time of the first round of interviews were completed on July 28, he knew that Mr. Jambois was one of the candidates being interviewed.

⁹ The "administrator shall use techniques and procedures designed to certify eligible applicants. . . ."

He received written notice on August 4 that Mr. Jambois was being considered. Both July 28 and August 4 are several weeks beyond the 30-day filing limit. Both events indicate that Appellant received notice of the fact that Mr. Jambois had been certified as a candidate for the position more than 30 days before he filed his appeal with the Commission.

Mr. Thiel has the burden of establishing that his appeal was timely filed. UW & OSER(KLINE), DEC. NO. 30818 (WERC, 3/04). He has not contended nor has he supplied any indication that he received notice on or after August 23 that Mr. Jambois had been added to the list of candidates being considered for the position in question. He has not disputed the information found in the materials accompanying the pending motion that indicate he knew no later than July 28 that Mr. Jambois was a candidate under consideration. The only information of record suggests that he received an e-mail on August 4 that listed Mr. Jambois as a candidate, which would mean Appellant's September 22, 2005 letter of appeal was received more than 30 days after he was notified of Mr. Jambois' certification. Appellant has not satisfied his burden.

Given the absence of any information to the contrary, the Commission must conclude that Mr. Thiel received notice no later than July 28, 2005, and that his letter of appeal in THIEL II, received by the Commission on September 22, 2005, was not timely with respect to a claim arising from the certification. Proposed issue 5 must be rejected on timeliness grounds.

Dated at Madison, Wisconsin, this 27th day of June, 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