

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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**KEITH D. PERKINS**, Appellant,

v.

**Secretary, DEPARTMENT OF CORRECTIONS**, Respondent.

Case 56  
No. 66091  
PA(adv)-102

**Decision No. 31901**

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**Appearances:**

**Keith D. Perkins**, appearing on his own behalf.

**Terri Rees**, Paralegal, Department of Corrections, PO Box 7925, Madison, WI 53707-7925, appearing on behalf of Respondent.

**ORDER DISMISSING APPEAL FOR LACK OF SUBJECT MATTER JURISDICTION**

This matter is before the Wisconsin Employment Relations Commission (the Commission) on a jurisdictional objection raised by the Department of Corrections (Respondent). The parties filed written arguments and on October 13, 2006, Respondent informed the Commission that it would not be filing a reply to Appellant's brief.

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

**FINDINGS OF FACT**

1. On or about October 30, 2005, the Appellant, who had obtained permanent status in class as a Supervising Officer 1 (Lieutenant) at Taycheedah Correctional Institution, was promoted to a Supervising Officer 2 (Captain) position at the same institution. He was required to serve a 12-month probationary period.

2. Respondent commenced an investigation into Appellant's work conduct on March 10, 2006.

3. After completing the investigation, Respondent notified Appellant by letter dated June 12, 2006, that his promotional period as a Captain was being terminated "for failure to meet probationary standards" and that he would be restored to a Lieutenant position effective June 25, 2006 at his former rate of pay.

4. Mr. Perkins filed a letter of appeal with the Commission on July 18, 2006, seeking to obtain review of the decision to "demote" him. He contended that the action was "without just cause" and argued:

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- 1) That there was no fair and impartial investigation conducted as required.
- 2) That similarly situated Supervisors were not disciplined for similar actions.
- 3) That the penalty is punitive and not corrective . . . .
- 4) That I had never received any training in the handling of incidents such as the one that led to my demotion . . . .
- 5) That there has never been any proof provided that I violated any work rules . . . .

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

**CONCLUSIONS OF LAW**

1. Appellant had not attained permanent status in class as a Captain by the time his employer terminated his probation and restored him to a Lieutenant position.
2. Appellant was not demoted.
3. The Commission lacks subject matter jurisdiction over this matter as an appeal filed under sec. 230.44 or .45, Stats.

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

**ORDER**<sup>1</sup>

This matter is dismissed for lack of subject matter jurisdiction as an appeal filed under Sec. 230.44 or .45, Stats.

Given under our hands and seal at the City of Madison, Wisconsin, this 7<sup>th</sup> day of November, 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

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<sup>1</sup> Upon the issuance of this Order, the accompanying letter of transmittal will contain the names and addresses of the parties to this proceeding and notices to the parties concerning their rehearing and judicial review rights. The contents of that letter are hereby incorporated by reference as a part of this Order.

**Department of Corrections (Perkins)**

**MEMORANDUM ACCOMPANYING ORDER DISMISSING APPEAL**

This matter arises from the decision to terminate Mr. Perkins' probationary employment as a Captain and to return him to a Lieutenant position, a classification in which he had previously attained permanent status in class. Perkins presumably sought to file his appeal under Sec. 230.44(1)(c), Stats. That paragraph provides:

If an employee has permanent status in class . . . the employee may appeal a demotion, layoff, suspension, discharge or reduction in base pay to the commission, if the appeal alleges that the decision was not based on just cause.

As part of his brief in opposition to Respondent's jurisdictional objection, Mr. Perkins submitted an extensive set of materials in an effort to show he "was never properly trained" and why he believes the "investigation should not have resulted in my removal from the position of Supervising Officer II." However, nothing in his submission related to the underlying question of whether the Commission has the statutory authority to review his appeal.

The jurisdictional question raised by Respondent's motion to dismiss is comparable to the one that was addressed by the Commission in DOC (KRISKA), DEC. NO. 31796 (WERC, 9/2006), PETITION FOR JUDICIAL REVIEW PENDING.<sup>2</sup> Mr. Kriska had been promoted from Lieutenant to Captain but his probationary period was terminated before he had obtained permanent status in the higher classification. Because of the probationary termination, Kriska was restored to a Lieutenant position where his employment with the agency continued. The Commission wrote:

The action that was taken by DOC related solely to Appellant's probationary status and it did not interfere with his permanent status in the Supervising Officer 1 classification. Therefore it was not a discharge that could be reviewed by the Commission pursuant to Sec. 230.44(1)(c).

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<sup>2</sup> KRISKA V. WERC, MILWAUKEE COUNTY CIRCUIT COURT, 06CV009545.

The Commission carefully distinguished a second case that arose from an employer's action that not only terminated an employee's promotional probation but also suspended his employment and demoted<sup>3</sup> him to a classification lower than the one from which he had promoted. *ARNESON V. UW*, CASE NO. 90-0184-PC (PERS. COMM. 2/6/92).

For the same reasons as in *KRISKA*, the Commission lacks the authority to hear this matter as an appeal under Sec. 230.44 or .45, and it must be dismissed.

Dated at Madison, Wisconsin, this 7<sup>th</sup> day of November, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

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Judith Neumann, Chair

Paul Gordon /s/

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Paul Gordon, Commissioner

Susan J. M. Bauman /s/

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Susan J. M. Bauman, Commissioner

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<sup>3</sup>The term "demotion" is defined in Sec. ER-MRS 1.02(5), Wis. Adm. Code, as "the permanent appointment of an employee with permanent status in one class to a position in a lower class than the highest position currently held in which the employee has permanent status in class . . . ."