

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

KATHLEEN GRUENTZEL, Appellant,

v.

Secretary, WISCONSIN DEPARTMENT OF NATURAL RESOURCES, Respondent.

Case 10
No. 66927
PA(adv)-119

Decision No. 32352

KATHLEEN GRUENTZEL, Appellant,

v.

Secretary, WISCONSIN DEPARTMENT OF NATURAL RESOURCES, Respondent.

Case 12
No. 67375
PA(adv)-131

Decision No. 32353

Appearances:

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

Daniel Graff, Attorney, DNR, 101 South Webster Street, Madison, Wisconsin 53707-7921, appearing on behalf of the Department of Natural Resources.

ORDER GRANTING MOTION TO DISMISS

These matters are before the Commission on Respondent's motion to dismiss the appeals for lack of subject matter jurisdiction.¹ The final date for submitting written arguments was January 16, 2008.

¹ In her written response to the motion, Appellant asked the Commission to deny the motion and grant judgment in favor of the Appellant or, in the alternative, to schedule further proceedings on the merits. To the extent the Appellant was advancing a motion for summary judgment, that motion is denied for the reasons expressed below.

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

FINDINGS OF FACT

1. At all relevant times, Appellant Kathleen Gruentzel has been employed by the Department of Natural Resources.

2. No later than December 2000, Appellant was employed as Park Manager for three State properties: Governor Dodge State Park, Blue Mound State Park and the Military Ridge State Trail. Her position was classified as a Natural Resources Property Supervisor and her duties encompassed managing property operations and guiding and supervising other employees. Her work address was at Governor Dodge State Park.

3. By letter dated March 28, 2007, Respondent notified Appellant: “[W]e are temporarily assigning you to Blue Mound State Park for a period up to six months, effective March 28, 2007.” Attached to the letter was a list of work activities that would be among the duties she would be expected to perform. The list included assisting with the management of the swimming pool, “maintaining water chemistry” for the pool, and participating in building and grounds maintenance as needed. The Appellant reported to Blue Mound State Park as directed.

4. By letter dated and filed on April 25, Appellant appealed “her demotion, constructive or otherwise,” contending it was without just cause. (Gruentzel I)

5. Appellant continued to work at Blue Mound State Park and on September 27, 2007, Respondent issued her a second letter “extending your temporary assignment at Blue Mound State Park for a period up to six months, effective September 29, 2007.”

6. She filed a second appeal with the Commission (Gruentzel II) on October 25, 2007, renewing her contention that the action was a demotion, constructive or otherwise, and that it was taken without just cause.

7. In a letter dated October 26, 2007, Respondent informed Appellant of the “decision to end your temporary assignment at Blue Mound State Park and return you as Property Supervisor of the Governor Dodge Work Unit, at Governor Dodge State Park, effective November 11, 2007.”

8. The parties dispute the precise nature of the duties that Appellant performed while working at Blue Mound State Park but agree that her duties changed from those she had previously been performing. Upon returning to Governor Dodge State Park in November, Appellant reassumed her former duties.

9. Appellant's civil service classification of Natural Resources Property Supervisor and her rate of pay did not change during the assignment to Blue Mound State Park.

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 these appeals are within the scope of the Commission's jurisdiction under Sec. 230.45(1), Stats.
2. The Appellant has failed to sustain that burden.
3. The Commission lacks the authority to review these matters.

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

ORDER²

Respondent's motion is granted and these matters are dismissed for lack of subject matter jurisdiction.

Given under our hands and seal at the City of Madison, Wisconsin, this 11th day of February, 2008.

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

² Upon 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.

DNR (Gruentzel I and II)

MEMORANDUM ACCOMPANYING ORDER GRANTING MOTION TO DISMISS

The question before us is whether the Commission has the authority under Sec. 230.45(1), Stats., to determine if the Department of Natural Resources had just cause to assign Ms. Gruentzel from one set of duties to a second set of duties for a period that ended up running seven months.

Of the various avenues of appeal that are available under Sec. 230.45(1), Stats., the only provision that Appellant seeks to invoke is Sec. 230.44(1)(c), Stats., which 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.

The Director of the Office of State Employment Relations and the Administrator of the Division of Merit Recruitment and Selection have adopted identical definitions of “demotion”:

“Demotion” means 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, unless excluded under s. ER-MRS 17.02.³

Gruentzel’s civil service classification of Natural Resources Property Supervisor never changed during the relevant time period, so we have to conclude that she was not formally demoted from one position into another one.

Under certain circumstances, the Commission has found that an employing agency has *constructively* demoted an employee even though there has been no action to formally change the classification level of the employee’s position. If an agency modifies an employee’s duties so they are better described in a lower classification and is motivated in doing so by an intent to discipline the employee, the agency may not avoid a just cause review of the action by calling it a mere reassignment of duties. DHFS & DMRS (WARREN), DEC. NO. 31215-A (WERC, 12/05). Part of the constructive demotion analysis is to determine the proper civil

³ Sections ER 1.02(8) and ER-MRS 1.02(5), Wis. Adm. Code.

service classification of the employee's new collection of duties in order to compare it to the class level assigned to the employee's former position. Just as in any other classification analysis, the determination of the proper class of the new collection of duties has to be based upon the duties that have been permanently assigned to the employee. Higher level work that is performed on a temporary basis does not qualify a position to be classified at a higher level.⁴ Similarly, temporary lower level work may not serve as the basis for finding a constructive demotion. This was the conclusion reached in *STACY v. DOC*, CASE NO. 97-0098-PC (PERS. COMM. 2/19/1998). Mr. Stacy was the superintendent of a correctional center at the time that an inquiry was initiated regarding how an inmate at the facility had been restrained. Stacy was reassigned to another facility for the "period of investigation" and it was undisputed that the duties he was performing there were at a lower classification level than superintendent. He filed an appeal contending he had been constructively demoted and the employing agency raised a jurisdictional objection:

The main question raised in Mr. Stacy's appeal is whether a constructive demotion can be said to exist based on a "temporary" change in duties at a lower level from a classification standpoint, a change which has been in effect since September 8, 1997, pending resolution of a criminal investigation to be followed by respondent's second investigation when such "temporary" reassignment had no impact on Mr. Stacy's current classification or wage. The Commission answers this question in the negative. While the concept of *constructive demotion* requires some leeway or deviation from the definition of demotion recited previously from the administrative code, the Commission never has found that a constructive demotion exists without a permanent change in job duties. [Emphasis in original].

At the time of the Commission's ruling, Mr. Stacy had been reassigned to the second facility for a period of five months.

The facts in the present case are substantially identical to those in *STACY*, except that at the time of our ruling, Ms. Gruentzel's temporary assignment has already ended. On March 28, 2007, Gruentzel was informed that she was being temporarily reassigned from her duties encompassing three state properties to a more limited set of duties at Blue Mound State

⁴ *GRAHAM v. DILHR & DER*, CASE NO. 84-0052-PC (PERS. COMM. 4/12/1985). Other decisions reaching similar conclusions include *DOJ & OSER (KNUTSON)*, DEC. NO. 31155-A (WERC, 6/2006); *GUTIERREZ v. DOT & DER*, CASE NO. 96-0096 (PERS. COMM. 4/11/1997); *STENSBERG ET AL. v. DER*, CASE NOS. 92-0325-PC, ETC. (PERS. COMM. 2/20/1995); *DOLSON v. UW & DER*, CASE NO. 93-0066-PC (PERS. COMM. 6/21/1994); *SIEWERT v. DER*, CASE NO. 91-0235-PC (PERS. COMM. 9/18/1992); *MILLER v. DHSS & DER*, CASE NO. 91-0129-PC (PERS. COMM. 5/1/1992).

Park.⁵ On September 27, 2007, DNR informed her that the temporary reassignment was being extended “for a period up to six months.”⁶ Then on October 26, Gruentzel learned the temporary assignment would end effective November 11, 2007 and she would return to her former Property Supervisor duties for three properties, once again working out of Governor Dodge State Park. Gruentzel has in fact returned to her former duties and no longer performs the duties associated with the temporary assignment. Under these circumstances, the Commission is unable to construe the Blue Mound assignment as anything other than temporary. Just as an employee who temporarily assumed higher level duties for a period of 7 months while a vacancy was being filled would not be entitled to have her position reclassified or reallocated based upon the temporary duties, Gruentzel cannot rely on her temporary duties as a basis for obtaining a just cause review of the decision to assign those duties.

Because the Appellant bases her claim of constructive demotion on temporary, rather than permanent, duties, the Commission lacks subject matter jurisdiction under Sec. 30.44(1)(c), Stats., and the appeals must be dismissed.

Dated at Madison, Wisconsin, this 11th day of February, 2008.

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

⁵ In her brief, Appellant contended that her assignment to Blue Mound “was executed without any apparent reason.” Respondent’s reply brief contained an affidavit from a regional supervisor contending that on or about March 28, 2007, Appellant was informed that the assignment was due to management concerns, including a disciplinary review of topics that were contained in a “Notice of Predisciplinary Hearing” delivered to her at the same meeting. The reply brief also contained a copy of a “written reprimand in lieu of suspension” issued to Appellant dated August 28, 2007. While disciplinary intent is a necessary element of constructive demotion, the focus of today’s jurisdictional ruling is on whether the assignment to Blue Mound State Park was permanent.

⁶ Prior rulings have recognized that at some point, for classification purposes, duties that have been denominated as “temporary” must be treated as permanent assignments. *FREDISDORF ET AL. V. DP*, CASE NO. 80-300-PC (PERS. COMM. 3/19/1982). Under the facts of the present case, we are persuaded that Ms. Gruentzel’s assignment to Blue Mound State Park did not become permanent.