

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JOELL SCHIGUR, Appellant,

v.

Attorney General, WISCONSIN DEPARTMENT OF JUSTICE, Respondent.

Case 3
No. 68096
PA(adv)-142

Decision No. 32626-B

Appearances:

Peter J. Fox, Attorney, Fox & Fox, S.C., 124 West Broadway, Monona, Wisconsin 53716, appearing on behalf of Ms. Schigur.

John R. Sweeney, Assistant Attorney General, P. O. Box 7857, Madison, Wisconsin 53707-7857, appearing on behalf of the Department of Justice.

DECISION AND ORDER

This matter is before the Wisconsin Employment Relations Commission on a motion by the Department of Justice (DOJ or Respondent) to dismiss for lack of subject matter jurisdiction. The appeal arises from DOJ's May 21, 2008 letter to Joell Schigur (Appellant) informing her that she had not completed satisfactorily the required probationary period as a Criminal Investigation Director, and restoring her to her prior position as a Special Agent In-Charge. Appellant contends that DOJ had waived the balance of her probationary period before the May 21 letter became effective.

In an Order issued on December 16, 2008, the Commission held that Appellant Schigur had not satisfied her burden to establish that the Commission had subject matter jurisdiction over this matter pursuant to Sec. 230.44(1)(a) or (d), Stats., or Sec. ER 46.03, Wis. Adm. Code. In the same Order, identified as an "Order Deferring Motion to Dismiss", the Commission granted Appellant's request for an evidentiary hearing to establish facts supporting her assertion that the Commission had subject matter jurisdiction under Sec. 230.44(1)(c), Stats., because the facts necessary to reach a conclusion on the question were contested.

No. 32626-B

A representative of the Commission conducted a prehearing conference with the parties on January 20, 2009. The parties agreed to the following statement of issue:

Whether the Commission has jurisdiction pursuant to Sec. 230.44(1)(c), Stats., as reflected in the Order Deferring Motion to Dismiss [with] the following subissues:

1. Whether Mr. Taffora approved a waiver within the meaning of Sec. ER-MRS 30.06, Wis. Adm. Code.¹
2. Was there written notice to DMRS?
3. Does past practice establish that written notice to DMRS was not necessary?

The parties engaged in discovery and agreed to a date for hearing. The Commission designated Kurt M. Stege, a staff member, as the hearing examiner.

Prior to the scheduled hearing, the Appellant concluded that it was unnecessary for the Commission to proceed with the hearing and the parties agreed to submit the matter for decision on the basis of depositions and written argument. The final submission was received on May 21, 2009. The hearing examiner issued a proposed decision on September 29, 2009. No objections were filed by the requisite due date of October 29, 2009.

For the reasons explained below, the Commission grants Respondent's Motion to Dismiss.

Being fully advised in the premises, the Commission makes and issues the following

FINDINGS OF FACT

1. At all relevant times, Joell Schigur, the Appellant in this matter, has been employed by the Division of Criminal Investigation (DCI) within the Wisconsin Department of Justice.

2. Effective May 28, 2006, she was promoted from her permanent civil service position of Special Agent In-Charge to a Career Executive position in DCI's Public Integrity Bureau with the title of Criminal Investigation Director. It was her initial appointment to the

¹ After the subissues had been established, Appellant was to "clarify her position" regarding the first subissue and indicate "if she concludes the matter never reached Mr. Taffora." Even though Appellant's brief includes language on the topic, her response focuses entirely on what she was told, rather than on whether Taffora actually approved a waiver.

Career Executive program. According to the appointment letter, she was required to “serve a two-year continuous trial period prior to attaining permanent status” in her new position. The Criminal Investigation Director serves as business manager in directing the “administrating operations” of DCI.

3. At the time of the Appellant’s promotion, Jim Warren was the DCI Administrator. He vacated the position sometime after November 9, 2007 and beginning on January 2, 2008, Mike Myszewski carried out the responsibilities on an “acting” basis. Mr. Myszewski was not hired to fill the Administrator position on a permanent basis until March 9, 2008.

4. Between the May 2006 promotion and November 2007, Appellant received uniformly positive performance evaluations from her supervisor, Jim Warren, for her work in the Criminal Investigation Director position.

5. Mike Myszewski, while still serving as the acting DCI Administrator, prepared Appellant’s 21-month performance evaluation. The two-page evaluation, which covered the period from November 27, 2007 until February 15, 2008, included the following in the “overall performance” section:

Joell continues to do an outstanding job of leading the Public Integrity Bureau and the Internet Crimes Against Children Program. Joell is a nationally recognized leader in the area of protecting children from internet predators. Joell has successfully mastered all of the objectives and standards for a bureau director. I recommend that Joell be removed from probation and receive permanent status as a director.

6. Mr. Myszewski also drafted a memorandum dated February 15, 2008 to Gary Martinelli, the Director of Human Resources for DOJ. In the memorandum, Myszewski noted in part that Appellant “had mastered all of the key job areas of a bureau director, and keeping her on probation for three more months is not necessary.” The memorandum requested termination of the remainder of Appellant’s trial period so that she would attain permanent status in the position and in the Career Executive program: “. . . I am recommending that Joell Schigur be removed from probation and confirmed in her position as bureau director.” The memorandum included a line for Myszewski’s signature as Acting Administrator.

7. Mr. Myszewski did not forward the memorandum to Mr. Martinelli or to the Human Resources office.

8. Mr. Myszewski communicated the results of his evaluation to Ms. Schigur on or about February 22, 2008, and gave her a copy. Myszewski knew he did not have the authority to waive a portion of Schigur's probation. He told her he was going to recommend that the remainder of her probationary period be waived, but did not tell her that the recommendation had been approved. He did not tell her she had passed probation.

9. Jim Warren had never been granted the authority to waive the trial period for someone in Appellant's circumstances. Respondent had not conveyed that authority to Myszewski. Authority in DOJ to waive a portion of an employee's probationary period was vested in Attorney General J. B. Van Hollen, who had also delegated that authority to Deputy Attorney General Raymond P. Taffora and Management Services Administrator Cindy O'Donnell. O'Donnell supervised Director of Human Resources Gary Martinelli, but the Attorney General had not delegated waiver authority to Martinelli.

10. It is DOJ's practice to notify an employee of his or her probationary status in writing. The practice encompasses notice of waiving a portion of the probationary or trial period, of successfully completing probation, and of the failure to pass probation. It is also DOJ's practice for the employee's supervisor to recommend waiver in writing before the agency will formally waive a portion of the probationary period.

11. A few days after she received the February evaluation, Schigur signed it and put it into Myszewski's mailbox.

12. Shortly thereafter, Myszewski showed Schigur the February 15 memorandum to Martinelli. He did not tell Schigur that she had already passed probation or that Taffora had agreed with the waiver recommendation.²

13. A copy of Schigur's 21-month performance evaluation was sent to the DOJ Human Resources office, but it did not reach there until April 2, 2008.

14. Schigur was never notified by the Attorney General, Deputy Attorney General or Management Services Administrator that a portion of her probationary period had been waived or that she had successfully completed probation.

² Myszewski's and Schigur's affidavits are at odds in terms of what Myszewski said during this conversation. Based on Myszewski's affidavit and the surrounding facts, including Taffora's rejection of Myszewski's recommendation, we conclude that Myszewski did not tell Schigur that Taffora had approved waiver. The Commission has modified this footnote in order to clarify the basis for Finding 12.

15. On or about February 25, Myszewski spoke with Deputy Attorney General Taffora regarding the contents of the February 15 memo. Myszewski recommended to Taffora that the remainder of Schigur's probation be waived. Taffora did not agree with the recommendation or approve a waiver. He stated that probation existed for a reason and Schigur should complete the final months of her probation. Myszewski, who was out of the office for much of the remainder of the week, did not inform Schigur of the conversation.

16. On or about March 12, 2008 and on other occasions during the last few weeks of March, Mr. Myszewski informed O'Donnell of concerns relating to Schigur's performance or conduct.³

17. Between February 22 and May 21, Myszewski did not inform Schigur that she was in jeopardy of not passing probation.

18. On April 8, 2008, Myszewski presented O'Donnell with a memo summarizing reasons for not passing Schigur off probation. O'Donnell agreed that Schigur should not pass probation. O'Donnell subsequently prepared a performance evaluation for Schigur indicating she would not be passed out of probationary status.

19. On May 21, 2008, Myszewski and O'Donnell met with Schigur and presented her with the new performance evaluation which read, in part:

On 2/22/08, I recommended that Joell be removed from probation and that she receive permanent status as a director. I can no longer make that recommendation based on her actions since that time. . . .

Therefore, I am terminating the probation of Joell Schigur.

20. By letter dated May 21, 2008, Gary Martinelli notified Appellant, in part, as follows:

Administrator Michael Myszewski has informed you that he is terminating this probationary period and returning you to your prior position as a Special Agent In-Charge.

³ O'Donnell initially understood that Schigur had already attained permanent status in class. Martinelli later informed her that Schigur was still in her training period.

The decision to terminate this probationary period was based on an assessment that you are not meeting the standards expected of a Criminal Investigation Director/Career Executive manager. . . .

[T]his letter is to formally notify you of your “noncompletion” of the required probationary period as a Criminal Investigation Director and your restoration to the position of Special Agent In-Charge for the DCI, Madison Regional Office effective May 22, 2008.

21. Ms. Schigur filed an appeal with the Commission on June 19, 2008 in which she made the following request for relief:

1. Declaration that she had reached permanent status as a DCI Public Integrity Director as of February 22, 2008;
2. Removal of her May 21, 2008 evaluation from her personnel file along with any reference to her not passing probation;
3. Immediate instatement into her previous DCI Public Integrity Director position as a permanent status employee;
4. Compensation for any loss of pay and/or benefits resulting from her demotion;
5. Compensation for her costs and attorney fees in bringing this action.

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 showing that the Commission has subject matter jurisdiction over this appeal.

2. Pursuant to Sec. 230.44(1)(c), Stats., the Commission has the authority to review a demotion where the Appellant has permanent status in class and the employee’s position is not covered by a collective bargaining agreement.

3. Appellant did not satisfy her burden of establishing that she had permanent status in class in the Criminal Investigation Director position prior to the termination of her probation in May 2008.

4. The Commission lacks the authority to hear this matter as an appeal under Sec. 230.44(1)(c).

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

ORDER⁴

Respondent's motion is granted and this matter is dismissed for lack of subject matter jurisdiction.

Given under our hands and seal at the City of Madison, Wisconsin, this 10th day of November, 2009.

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

⁴ 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.

Attorney General, Wisconsin Department of Justice (Schigur)

MEMORANDUM ACCOMPANYING DECISION AND ORDER

In its December 6, 2008 Order Deferring Ruling on Motion to Dismiss, the Commission summarized the dispute as follows:

Sometime prior to May of 2006, Joell Schigur, the Appellant, had attained permanent status in class with the Department of Justice as a Special Agent In-Charge. Then, effective May 28, 2006, she was promoted to a position in the Career Executive program and was required to serve a two-year “trial period” in the higher-level position. In an action effective May 22, 2008, Respondent putatively removed the Appellant from the Career Executive position as Criminal Investigation Director, and returned her to her former Special Agent In-Charge position. Appellant contends that earlier, in February 2008, she had attained permanent status in the Criminal Investigation Director position so that the subsequent May transaction has to be viewed as a demotion to a position outside of the Career Executive program and to a lower pay range. . . . Under these circumstances, Appellant contends, the May transaction is reviewable under Sec. 230.44(1)(c), Stats.,⁵ as a demotion. Respondent makes the contrary assertions that Appellant had not completed the trial period required for permanent status in the Career Executive position before the May 22, 2008 action was effectuated and that it properly returned her to the Special Agent In-Charge position before she attained permanent status in the career executive program.

The Career Executive program is governed by administrative rules that have been adopted by the Administrator of the Division of Merit Recruitment and Selection (DMRS). Among those rules is Sec. ER-MRS 30.06(1), Wis. Adm. Code:

Upon initial appointment to the career executive program, a career executive employee, prior to attaining permanent status, shall serve a 2 year continuous service trial period. However, one year, or any portion thereof, *may be waived*

⁵ Section 230.44(1)(c), Stats., provides in part:

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.

“Permanent status in class” is defined in Sec. ER 1.02(29) and in Sec. ER-MRS 1.02(23), Wis. Adm. Code, as “the rights and privileges attained upon successful completion of a probationary period required upon an appointment to permanent, seasonal or sessional employment.”

by the appointing authority at any time after a one year continuous service trial period has been served after both the employee and the administrator have been notified in writing. . . . Upon successful completion of the trial period, a career executive employee attains permanent status. . . . (Emphasis added.)

The rule's reference to "the administrator" is to the Administrator of DMRS.

One of the arguments addressed in the Commission's December 6, 2008 Order Deferring Motion to Dismiss was DOJ's contention that the agency "could not have waived the final three months of Appellant's career executive trial period because the Administrator of DMRS was never notified of DOJ's intent to waive it." Respondent's most recent written argument includes the following statement:

Although, Wis. Admin. Code Sec. ER-MRS 30.06(1) requires such notice to DMRS, such rule is largely unenforced and DOJ has never observed the rule. Accordingly, for the purposes of its motion to dismiss, DOJ does not argue the point further.

Based on Respondent's current position regarding the topic, the Commission will not further address what, if any, significance should be placed on the reference to DMRS in Sec. ER-MRS 30.06(1), Wis. Adm. Code.⁶

Appellant's assertions in this case arise from information provided to her by Acting Administrator Myszewski on or about February 22. At that time, Myszewski informed her that he was going to *recommend* waiving the remainder of Schigur's trial period. Appellant advances two arguments.

Appellant's arguments

Appellant's first argument is, as shown below, premised on ignoring the record that is established by the parties' submissions. She argues:

The February 2008 recommendation that Ms. Schigur be made a permanent director (as provided in her performance evaluation and Myszewski's memo to Martinelli) was consistent with DOJ's past practice in waiving the remainder of a trial period/probation and establishing an employee's permanent status.

⁶ In a deposition, Mr. Martinelli indicates he believes DMRS would not have to be notified if it had already delegated the authority to waive a portion of a probationary period to the employing agency. This understanding presumably serves as the basis for the Respondent's current position.

Contrary to the Appellant's assertion, the record indicates that the agency's waiver practice is: 1) for the supervisor of the employee to make a written recommendation for waiver; 2) for someone, with authority, to grant approval; and 3) for the employee to be formally notified, in writing, of the waiver and concomitant completion of probation.⁷ The parties agree that Myszewski, in the role of Appellant's acting supervisor, recommended waiver. Nevertheless, Myszewski lacked authority to grant the waiver, Myszewski's recommendation was rejected by Deputy Attorney General Taffora, and no one else with the authority to grant the waiver approved it. In addition, Schigur was never notified, in writing, that the remainder of her probationary period as Criminal Investigation Director had been waived and that she had obtained permanent status in class. The fact that Schigur was aware her acting supervisor recommended waiver relates to only one of several steps required to waive an employee's probationary period. Schigur never learned of the completion of the remaining steps because they were never completed. Even if the Appellant had been able to show that Deputy Attorney General Taffora's predecessors routinely accepted the supervisor's recommendation, reliance on DOJ's past practice does not result in permanent status for Schigur. Taffora held the authority to either accept or reject Myszewski's recommendation. He exercised his discretion by declining to waive the remainder of Schigur's trial period.

For her second argument, Schigur contends:

All actions and behavior between February 2008 and May 2008 were consistent with Ms. Schigur's understanding and belief that she continued to "master the objectives of her position" and had obtained permanent status.

Schigur suggests that Myszewski failed to fulfill his responsibility to provide her with a warning or other notice that he believed her performance had become unsatisfactory, and that this failure amounted to an abuse of discretion. According to Appellant, Myszewski's conduct during this period "corroborate[d] Ms. Schigur's legitimate belief that she already attained permanent status."

Based both on what she was told and on DOJ's past practice, it was not reasonable for Schigur to believe that she had attained permanent status in class simply because her acting supervisor told her he was recommending that the balance of her trial period be waived. Schigur jumped to an unwarranted conclusion. She never received any information indicating someone had acted on Myszewski's recommendation. It was, in fact, rejected.⁸

⁷ This last requirement is consistent with the language of Sec. ER-MRS 30.06(1), Wis. Adm. Code, which requires written notification to the employee.

⁸ We have rejected the Appellant's contention that Myszewski told her Taffora had agreed to waive the remainder of the trial period. To the extent the Appellant is asserting that there was actual approval of the waiver by someone with the authority to approve it, she has not sustained her burden of persuasion because there is no supportive evidence. The Commission has added this footnote to clarify our conclusions.

A mere assertion that the employer abused its discretion by failing promptly to inform an employee of performance concerns is not actionable under Sec. 230.44(1)(c), Stats. A failure promptly to inform is not one of the five disciplinary actions (demotion, layoff, suspension, discharge and reduction in base pay) that are specified in paragraph (c) of that section.

For the reasons above, the Commission lacks subject matter jurisdiction over this appeal and it must be dismissed.

Dated at Madison, Wisconsin, this 10th day of November, 2009.

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