

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

CLINT PEACHEY, Appellant,

v.

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

Case 102
No. 68829
PA(adv)-160

Decision No. 32820

Appearances:

Todd A. Snow, Grant, Snow & Snow, S.C., P.O. Box 591, Waupun, WI 53963-0591, appearing on behalf of the Appellant, Clint Peachey.

Gloria J. Thomas, Assistant Legal Counsel, P. O. Box 7925, Madison, WI 53707-7925, appearing on behalf of the Department of Corrections.

ORDER DENYING MOTION TO DISMISS

This matter, which arises from the action to discipline the Appellant by employing him as a Correctional Sergeant rather than as a Supervising Officer 1, is before the Wisconsin Employment Relations Commission on Respondent's motion to dismiss the appeal for lack of subject matter jurisdiction. The final date for submitting written arguments was July 1, 2009. With the exception of Finding 5, the parties do not appear to dispute any of the relevant facts.

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

FINDINGS OF FACT

1. Prior to July 2006, Appellant attained permanent status in class as a Supervising Officer 2 at Kettle Moraine Correctional Institution (Kettle Moraine).
2. In July 2006, Appellant voluntarily demoted to a position in the Correctional Sergeant classification and transferred to Dodge Correctional Institution (Dodge).
3. Kettle Moraine and Dodge are considered separate employing units.
4. Appellant was reinstated to a Supervising Officer 1 (Lieutenant) position at Dodge effective May 18, 2008. The reinstatement letter informed Appellant, in part: "You will be required to complete a twelve-month permissive probationary period."
5. The relevant statutes and administrative rules permitted no more than a six -month probationary period for the Appellant in the Lieutenant position.

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6. By letter dated March 26, 2009, the Dodge warden informed Appellant of his “removal from the Supervising Officer 1 position at Dodge Correctional Institution effective March 28, 2009, due to your failure to meet probationary standards” related to various events several months earlier. Appellant was restored to a Correctional Sergeant position at the same institution effective March 29.

7. Appellant filed an appeal with the Commission on April 24, 2009 seeking reinstatement as a Supervising Officer 1 “with all back pay, time in rank and benefits” and the withdrawal of a performance evaluation.

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 appeal.

2. The Appellant has sustained that burden.

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

ORDER

Respondent’s motion is denied and the parties will be contacted for further processing of this matter.

Given under our hands and seal at the City of Madison, Wisconsin, this 4th day of August, 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

Department of Corrections (Peachey)

MEMORANDUM ACCOMPANYING ORDER DENYING MOTION TO DISMISS

Respondent contends that at the time Appellant was removed from a Supervising Officer 1 (Lieutenant) position at Dodge Correctional Institution in March 2009, he was still serving permissive probation and lacked the permanent status in class necessary to pursue an appeal of his removal to the Commission.¹ Appellant argues that even though Respondent had informed him when he began in the Lieutenant position in May 2008 that he was to serve a twelve-month probationary period, the civil service code limited his probationary period to six-months so that he had attained permanent status in class by March 2009 prior to the action in question.

The Commission's authority under Sec. 230.44(1)(c), Stats., to review certain disciplinary actions is limited to employees who, at the time of the discipline, have permanent status in class.²

A review of the relevant provisions of the State civil service code shows Respondent could only impose a six-month period of probation upon Appellant's reinstatement in May 2008. Therefore, he attained permanent status in class in November 2008, before the March 2009 action that removed him from the Lieutenant position and placed him in a Correctional Sergeant position.

The statutory provision that establishes the basic parameters of probationary periods is Sec. 230.28, Stats. It provides, in part:

(1)(a) All *original and all promotional appointments* . . . with the exception of those positions designated as supervisor or management . . . in the classified service shall be for a probationary period of 6 months. . . . Dismissal may be made at any time during such periods. . . .

(am) All probationary periods for employees in supervisory or management positions are one year However, *persons who transfer or are reinstated to supervisory or management positions consistent with conditions under sub. (4) and who had previously obtained permanent status in class in a supervisory or management position prior to the transfer or reinstatement shall serve a probationary period in accordance with sub. (4).* . . .

¹ An employee serving a probationary period upon promotion from Supervising Officer 1 to 2 who was returned to a Supervising Officer 1 position after being notified that he had not successfully completed his probationary period has no right to appeal the action to the Commission. KRISKA v. WERC, 2008 WI APP 13.

² "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."

(4) A person reinstated in an employing unit other than one in which the person previously served in permanent status in the class in which the person is being reinstated . . . may be required by the appointing authority to serve a probationary period. Provisions for the duration of such probationary period shall be provided in the rules of the administrator. (Emphasis added.)

Appellant's 2008 appointment as a Lieutenant at Dodge was not an original appointment and not a promotional appointment. Appellant had previously attained permanent status in class as a Supervising Officer 2 while employed at Kettle Moraine so he reinstated in May 2008 into the position at Dodge, a different work unit than Kettle Moraine. Both 230.28(4) and Sec. ER-MRS 16.04(1)(b), Wis. Adm. Code,³ establish that under these circumstances, Respondent had the option of imposing a probationary period. Section ER-MRS 13.02, Wis. Adm. Code dictated the duration of that period:

All probationary periods shall be for 6 months duration, except:

- (1) In the case of an understudy
- (2) In the case of employees who have not demonstrated the capacity to be granted permanent status in class within 6 months after the beginning of an original or promotional probationary period
- (3) In the case of administrative, technical or professional positions
- (4) In the case of permissive probationary periods, the duration may be less than 6 months at the discretion of the appointing authority.
- (5) In the case of initial original or promotional appointments to positions designated as supervisory or managerial
- (6) In cases where it is specifically provided otherwise in separate pay schedules.

None of the exceptions listed in ER-MRS 13.02 applied to Appellant's permissive probation that began in May 2008. This means that Respondent only had the authority to impose a six-month period of probation, so the Appellant automatically attained permanent status in class when he was still in the position in November 2008.⁴

³ The paragraph reads:

A person who is reinstated to a different employing unit in the same agency from which the person earned reinstatement eligibility may be required by the appointing authority to serve a probationary period. If not required to serve a probationary period, the employee shall immediately attain permanent status in class. If required to serve a probationary period, the employee may be terminated from the service by the appointing authority during the probationary period without the right of appeal.

⁴ As provided in Sec. ER-MRS 13.09, Wis. Adm. Code:

Permanent status in class is attained immediately upon completion of the last work period to which the employee was assigned to work during his or her probationary period regardless of whether it falls on or before the last day of the probationary period. Prior to the end of the probationary period, the appointing authority shall notify the employee in writing that the employee will attain permanent status in class. No employee may be denied permanent status in class after successfully completing a probationary period because an appointing authority fails to submit notice.

In light of the Appellant's permanent status in class, Respondent's March 2009 personnel action has to be viewed as a demotion rather than as the termination of probation. Demotion is defined as the "permanent appointment of an employee with permanent status in one class to a positioning a lower class than the highest position currently held in which the employee has permanent status in class" Sec. ER-MRS 1.02(5), Stats.

The Commission will provide the parties a period from the date of this interim order in which to try to reach an agreement that will resolve the remaining areas of dispute. If that effort is unsuccessful, the parties will be provided an opportunity to address the Appellant's assertion that the demotion violated his due process rights.

Dated at Madison, Wisconsin, this 4th day of August, 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