

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

SCOT GALLIGAN, Appellant,

v.

**Secretary, WISCONSIN DEPARTMENT OF CORRECTIONS, and
Administrator, DIVISION OF MERIT RECRUITMENT AND SELECTION,**
Respondents.

Case 96
No. 68571
PA(adv)-155

Decision No. 32987

Appearances:

Timothy M. Scheffler, Stix Law Offices, 700 Rayovac Drive, Suite 117, Madison, Wisconsin 53711, appearing on behalf of Appellant Scot Galligan.

Kathryn R. Anderson, Chief Legal Counsel, P. O. Box 7925, Madison, Wisconsin 53707-7925, appearing on behalf of the Department of Corrections.

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

**ORDER GRANTING MOTION TO DISMISS (1)(a) CLAIM AND
DENYING MOTION FOR SUMMARY JUDGMENT**

This matter, which arises from the imposition of discipline, is before the Wisconsin Employment Relations Commission (the Commission) on Respondents' motion to dismiss the appeal for lack of subject matter jurisdiction and motion for summary judgment. The final date for submitting written arguments was January 25, 2010.

Solely for the purpose of ruling on the Respondents' motion to dismiss for lack of subject matter jurisdiction and as reflected in the Findings of Fact, the Commission has liberally construed any information set forth in the Appellant's submissions. The format of the Commission's decision is prescribed, in part, by Sec. 227.47(1), Stats.

The Findings of Fact set forth below are made solely for the purpose of ruling on Respondents' motions.

No. 32987

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

FINDINGS OF FACT

1. Appellant Scot Galligan is employed by the Department of Corrections (DOC) in the Division of Adult Institutions. He was promoted to the State civil service classification of Supervising Officer 2 (SO2 or Captain) no later than approximately July 11, 2007.

2. Prior to December 18, 2008, Galligan was employed at Kettle Moraine Correctional Institution (Kettle Moraine), which is a medium security institution for adult male inmates. Kettle Moraine is one of numerous correctional facilities operated by DOC's Division of Adult Institutions. After his promotion to Captain, Galligan occupied position number 003121.

3. While employed as a Captain at Kettle Moraine, Galligan was known either as the Segregation Captain or the Programs Captain. He also served as the institution's Investigating Captain and Due Process Captain and was a member of Kettle Moraine's Administrative Team. He attended the institution's Administrative meetings, routinely filled in for the Security Director, and was one of the Disruptive Group Coordinators.

4. All Captains at Kettle Moraine have generic position descriptions. Their individual job duties are more specifically described in their Performance Planning and Development reports.

5. The Supervising Officer classification series includes both the SO1 (Lieutenant) and SO2 levels. SO1 is a lower classification than SO2.

6. Respondent investigated possible misconduct by Captain Galligan in 2008 and in separate letters of discipline dated December 18, 2008, reprimanded him¹ and reassigned him to a position at Dodge Correctional Institution (Dodge).

7. The reassignment letter was signed by John Bett, the Administrator of the Division of Adult Institutions and included the following:

This letter is official notice that you are being reassigned to the position of Supervising Officer 2, at Dodge Correctional Institution, effective January 4, 2009.

Your pay will remain the same

¹ The letter of reprimand is not a subject of this appeal.

This reassignment is a result of your admitted actions and behavior which you revealed during a recent investigation. . . .

Your actions have created an environment of mistrust in which those with whom you work would be uncomfortable. . . . Your ability to have an effective working relationship with your supervisors, peers and subordinates has been severely compromised. Your ability to work effectively as a supervisor at [Kettle Moraine] has been damaged. As a result I have reached a decision to reassign you to another institution.

8. There is always a Supervising Officer on duty at Kettle Moraine, just as there is at Dodge. If there is no Captain on a shift, a Lieutenant on duty during that shift assumes the responsibility of being shift commander for the institution. During non-business hours, the shift commander is the highest ranking employee on site.

9. Dodge is a maximum security prison that also provides certain centralized services for the Division of Adult Institutions, including serving as the reception facility for new inmates. Dodge has a Central Transportation Unit that transports up to 40 inmates on coach buses between various Division of Adult Institution facilities. Supervising Officers who either are assigned to the transportation unit or are relief supervisors for that unit are required to obtain and maintain a commercial drivers' license. All bus trips require the presence of a Supervising Officer in addition to subordinate staff.

10. Some Captain positions at Dodge have specific job duties. These include an Administrative Captain and a Programs Captain. Others are identified as "line" Captains. Line positions assume responsibility for maintaining security, custody, and control of inmates, and for providing discipline and order within the institution on an assigned shift. The Supervising Officer line positions at Dodge have very similar duties, irrespective of whether the employees are serving in positions classified as Supervising Officer 1 or 2. When a Supervising Officer 2 is the shift commander, s/he has authority over SO1s for decision-making purposes.

11. The Captain position that Appellant occupies at Dodge is responsible for serving as line relief on any shift if the regular Shift Captain has a day off or is using vacation/holiday or scheduled sick leave. At Dodge, the Appellant also serves in a relief capacity as Supervising Officer for Transportation bus trips.

12. Galligan's Position Description for his position at Dodge has the words "New Position" in the area for listing the former incumbent. The Position Description is otherwise substantially identical to that of at least one other line Captain position at the same institution. It is also substantially identical to the position description for the Programs Captain position at Dodge when it was occupied by Charles Pearce.

13. Immediately prior to Appellant's move and during approximately the first month after he switched facilities, there were no open Supervising Officer positions at Dodge.

14. Effective February 1, 2009, Respondent formally moved position number 003121 from Kettle Moraine to Dodge. Certain approvals were required before the position could be moved. Prior to the move, Kettle Moraine had paid Galligan's wages.

15. A Supervising Officer 1 position at Dodge became vacant in May 2009 and the position was transferred to Kettle Moraine. After the transfer, the position's classification was changed from SO1 to SO2 and it was filled at the higher level. The position description listed Clint Peachey, SO1, as the former incumbent and listed the position number as 303036. Mr. Peachey had worked as a second shift line SO1 at Dodge in position 303036 on the day that Galligan moved from Kettle Moraine.

16. At Dodge, Galligan serves as a Disruptive Group Specialist rather than as a Coordinator of that group.

17. Galligan filed a letter of appeal with the Commission via both email and facsimile on April 22, 2009.

18. During a prehearing conference conducted on February 17, 2009, the Appellant specified that the Appellant was contending the Commission has subject matter jurisdiction pursuant to Sec. 230.44(1)(a) and/or (c), Stats.

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 claim under Sec. 230.44(1)(a), Stats.

2. Based on the uncontested facts drawn from a liberal reading of Appellant's written submissions, the Appellant has failed to sustain that burden.

3. The Respondent has the burden to establish the absence of any material disputed facts relative to Appellant's claim that he was constructively demoted and that Respondent is entitled, as a matter of law, to summary judgment in its favor.

4. The Respondent has failed to sustain 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 to dismiss Appellant's claim under Sec. 230.44(1)(a), Stats., is granted but the companion motion for summary judgment is denied as to Appellant's claim that he was constructively demoted.

Given under our hands and seal at the City of Madison, Wisconsin, this 26th day of February, 2010.

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 & Division of Merit Recruitment and Selection (Galligan)

**MEMORANDUM ACCOMPANYING ORDER
GRANTING, IN PART, MOTION TO DISMISS**

The Department of Corrections issued Supervising Officer 2 (Captain) Scot Galligan both a letter of reprimand² and notice of a disciplinary “reassignment” on December 19, 2008. Galligan filed an appeal asserting he was constructively demoted and asked the Commission to assert authority under Sec. 230.44(1)(a) and (c), Stats., to review his move from Kettle Moraine Correctional Institution to Dodge Correctional Institution. Respondents filed a motion to dismiss/motion for summary judgment contending, in part, that because there was no constructive demotion, the Commission lacked subject matter jurisdiction.

Because the precise nature of the underlying personnel action is in dispute, the Commission will refer to the consequence of the December 18, 2008 “reassignment” letter simply as Appellant’s “move” from Kettle Moraine to Dodge.

Appellant Galligan argues that two paragraphs of Sec. 230.44(1), Stats., provide a jurisdictional basis for his appeal:

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.* 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. 230.04(2) . . .
- (c) *Demotion, layoff, suspension or discharge.* 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.

Analysis of (1)(a) claim: issue of subject matter jurisdiction

In his brief in opposition to Respondent’s motion, the Appellant characterizes his claim under Sec. 230.44(1)(a), Stats., as follows:

Two separate actions by the Division of Adult Institutions violated the procedures of the Division of Merit Recruitment and Selection and abused the power delegated to it. First, the Appellant was subjected to a functional layoff-of-one by the decision to eliminate an SO2 position from [Kettle Moraine].

² As noted above, the letter of reprimand is not a subject of this appeal.

Second, a new . . . position was created for [Dodge], without a competitive hiring process, and the position was forced upon the Appellant, in violation of his and other employees' rights. . . .

[T]he movement of funds for a position does not allow for the employee attached to the position to be swept along under the radar of the civil service system with it. The DOC's conduct constituted decisions to forgo the requirements of the civil service system to serve its own ends to the detriment of the Appellant and his rights. . . . [Footnote omitted.]

In order to invoke the Commission's paragraph (1)(a) jurisdiction, the Appellant must be able to identify a personnel decision that was either made by the Administrator of the Division of Merit Recruitment and Selection,³ or was delegated by the Administrator to an appointing authority.⁴ The Administrator's authority is described in Sec. 230.05, Stats. In contrast, however, it is the appointing authority, not the Administrator, who, pursuant to Sec. 230.06(1)(b), Stats., shall "[a]ppoint persons to or remove persons from the classified service, discipline employees, designate their titles, assign their duties and fix their compensation. . . ." Decisions by appointing authorities must comply with administrative rules adopted by the Administrator,⁵ but the decisions themselves are attributable to the appointing authority rather than the Administrator. Actions to assign duties to an employee are not reviewable under Sec. 230.44(1)(a), Stats., because they are actions taken by the appointing authority pursuant to Sec. 230.06(1)(b), Stats., and not by the Administrator.

While assigning duties to an employee is a function of the appointing authority, the Administrator is required to authorize any *transfer*, so that a decision of the Administrator to either authorize a transfer or refuse to authorize a transfer is reviewable by the Commission pursuant to our authority established by Sec. 230.44(1)(a), Stats. "[A] transfer may be made

³ The term "administrator" that is used in Sec. 230.44(1)(a), Stats., is defined in Sec. 230.03(1) and (10), Stats., as the Administrator of the Division of Merit Recruitment and Selection.

⁴ Respondent DOC has submitted an affidavit indicating that the Administrator has, in fact, delegated to the agency the authority to authorize transfers between SO2 positions within DOC. This apparent fact is immaterial to the resolution of the jurisdictional dispute. In order to make our jurisdictional analysis as understandable as possible, the remainder of this Order Granting, In Part, Motion to Dismiss ignores the delegation because to do otherwise would only have confusing, rather than substantive, effect.

⁵ Chapters ER-MRS 1 through 34, Wis. Adm. Code.

from one position to another only if specifically authorized by the administrator.” Section 230.29(1), Stats. The term “transfer” is defined in Sec. ER-MRS 1.02(33), Wis. Adm. Code, as:

[T]he permanent appointment of an employee to a different position assigned to a class having the same or counterpart pay rate or pay range as a class to which any of the employee’s current positions is assigned.

There are a number of decisions that confirm the Commission’s authority to review the Administrator’s authorization decision, “[h]owever, an appeal of the administrator’s action or inaction in failing to authorize the transfer does not perforce give rise to jurisdiction over the transfer itself. . . .” WITT v. DILHR & DER, CASE NO. 85-0015-PC (PERS. COMM. 8/26/1985).

In the present case, Respondent DOC never treated Appellant’s move from Kettle Moraine to Dodge as a transfer and it is undisputed there never was a decision authorizing such a transfer. In their arguments in support of the motion to dismiss, Respondent DOC continues to take the position that the move was not a transfer as that term is defined by rule. Even if we assume, solely for the purpose of argument, that the move should have been effectuated as a transfer but that DOC never sought the authorization required by Sec. 230.29(1), Stats., the jurisdictional basis advanced by the Appellant, Sec. 230.44(1)(a), still does not encompass an alleged failure to obtain requisite authorization.

This conclusion is explained by a case arising from a different source of jurisdiction: the Commission’s responsibility to serve as the final step in the non-contractual grievance procedure pursuant to Sec. 230.45(1)(c), Stats.⁶ In STASNY v. DOT, CASE NO. 78-158-PC (PERS. COMM. 10/12/1979), AFF’D DOT v. PERS. COMM. (STASNY), DANE COUNTY CIR. CT., 79-CV-6102, 6130, 2/27/1981, the appellant was a Training Officer 1, in Madison, who had originally provided training to local law enforcement officers in the use of a computer system. However, he had been moved to the agency’s training academy at Fort McCoy where, at least initially, he was told to develop a communications training program for local law enforcement agencies and to help perform clerical duties whenever necessary. Mr. Stasny initiated a non-contractual grievance which was denied at the third step and then appealed. He argued, among other things, that his move from Madison to Fort McCoy was intended to be a form of discipline even though it was not identified as such, that the move satisfied the definition of transfer at that time, and that the Department of Transportation had violated Sec. 230.29,

⁶ The specific provisions currently setting forth the scope of the Commission’s authority in this area are found in the administrative rules of the Office of State Employment Relations, Ch. ER 46, Wis. Adm. Code.

Stats., because it had failed to obtain authorization for a transfer from the administrator.⁷ The Commission rejected the agency's contention that no transfer had occurred, concluded that authorization under Sec. 230.29, Stats., was required but not obtained, and voided the transaction because of the failure to comply with a mandatory provision of the Wisconsin Statutes.

The STASNY case was in the form of a non-contractual grievance that was based on the employing agency's failure to obtain approval from the administrator under Sec. 230.29, Stats. In contrast, the present matter seeks to invoke the Commission's authority to review a decision of the administrator as the vehicle to review a substantially similar claim relating to alleged inaction of the employing agency.⁸ The Commission's jurisdiction under Sec. 230.44(1)(a), Stats., relates to decisions of the administrator (or decisions delegated by the administrator) rather than, as here, a decision, action, or inaction by the employing agency. The Commission's paragraph (1)(a) jurisdiction does not extend to an alleged failure of the Department of Corrections to seek authorization to move the Appellant from Kettle Moraine to Dodge.

The Administrator of the Division of Merit Recruitment and Selection must also review and approve any layoff plan prior to implementation,⁹ but nothing suggests that Respondent ever prepared such a plan in this matter, much less that the Administrator reviewed and approved it. As a result, there is no basis for concluding that the Commission may exercise jurisdiction over a decision made by the Administrator to approve a layoff plan regarding Mr. Galligan.

The Appellant has failed to identify any personnel decision made by the Administrator or delegated by the Administrator that could be reviewed pursuant to Sec. 230.44(1)(a), Stats.

⁷ When the STASNY appeal was decided, the term "administrator" in Ch. 230, Stats., referred to the Administrator of the Division of Personnel, a position that no longer exists. This distinction is not relevant to the resolution of the present motion.

⁸ As reflected in the conference report for the prehearing conference held with the parties on February 17, 2009, the Appellant is only contending that the Commission has subject matter jurisdiction pursuant to Sec. 230.44(1)(a) and (c), Stats. In addition, the Appellant has not asserted that he pursued a grievance through the first three steps of the non-contractual grievance procedure so as to serve as a basis for seeking Commission review at the fourth step of that procedure as provided in Sec. 230.45(1)(c), Stats.

⁹ See Sec. ER-MRS 22.05, Wis. Adm. Code.

Analysis of (1)(c) claim: summary judgment motion

To the extent Galligan contends the action taken by Respondent was a transfer or a constructive transfer, transfers are not listed as one of the disciplinary actions made reviewable under Sec. 230.44(1)(c), Stats. STASNY, ID. However, demotions are listed in paragraph (c) and the Commission recognizes that actions properly described as constructive demotions are an aspect of our (1)(c) authority. COHEN V. DHSS, CASE NOS. 84-0072-PC ET AL. (PERS. COMM. 2/5/1987). Mr. Galligan contends he was constructively demoted from a Captain (Supervising Officer 2) position to a Lieutenant (Supervising Officer 1) position. There is no dispute that if true, this would be a movement into a lower classification.

The requirements for a constructive demotion were described in DHFS & DMRS (WARREN), DEC. NO. 31215-A (WERC, 12/2005) as follows:

First, there must be a determination that a demotion has occurred, however it is denominated by the Respondent, in the sense that the new set of duties must be better described in a lower classification (rather than a classification assigned to a counterpart pay range) than the old set of duties. Second, there must be a finding that the action was taken for disciplinary reasons.

Respondent disputes that Appellant's new duties are better described at a lower class level than SO2.¹⁰ Whether Respondent intentionally moved him from Kettle Moraine to a lower classification level at Dodge is not properly the subject of a motion for summary judgment.¹¹ However, if Respondent could definitively establish that Appellant's duties at Dodge can only be appropriately classified at the SO2 level, Respondent would be entitled to prevail.

In deciding whether Appellant's duties at Dodge are better described at the SO1 or SO2 level, the Commission must analyze "the duties assigned to the position, the relevant class specifications, the classification factors and comparable positions." COHEN V. DHSS, CASE NOS. 84-0072-PC ET AL. (PERS. COMM. 2/5/1987).

¹⁰ Respondent also argues that "there must be a movement between positions for there to be a demotion or even a constructive demotion." This argument is inconsistent with the rationale relied upon by the Commission in asserting jurisdiction over constructive discipline. The fact that the position number attached to Galligan's position did not change upon his move from Kettle Moraine to Dodge has no significance if the other requirements of a constructive demotion have been met. See DAVIS V. ECB, CASE NO. 91-0214-PC (PERS. COMM. 6/21/1994). (The employee prevailed on a constructive demotion claim after the employer gradually made substantial changes in her duties but never moved her into a separate position.)

¹¹ Issues of intent are typically inappropriate for determination without the opportunity for a hearing. DOA (SUTHEIMER), DEC. NO. 30932 (WERC, 6/2004).

Applicable summary judgment standards

Although it was not initially identified as such, the Respondent's motion relating to Mr. Galligan's constructive demotion claim is a motion for summary judgment that relies upon affidavits and exhibits to support Respondent's factual assertion that Appellant's collection of duties at Dodge is still properly classified at the Supervising Officer 2 level. The Commission considers the following when addressing a motion for summary judgment:

The Commission may summarily decide a case when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Generally speaking, the following guidelines apply. The moving party has the burden to establish the absence of any material disputed facts based on the following principles: (a) any disputed facts that would not affect the final determination are immaterial and insufficient to defeat the motion; (b) inferences to be drawn from the underlying facts contained in the moving party's material should be viewed in the light most favorable to the party opposing the motion; and (c) doubts as to the existence of a genuine issue of material fact should be resolved against the party moving for summary judgment. The non-moving party may not rest upon mere allegations, mere denials or speculation to dispute a fact properly supported by the moving party's submissions. If the non-moving party has the ultimate burden of proof on the claim in question, that ultimate burden remains with that party in the context of the summary judgment motion.

It is appropriate to apply the above guidelines in a flexible manner, after considering at least the following factors that are relevant to resolution of a matter filed under Sec. 230.44, Stats.:

1. *Whether the factual issues raised by the motion are inherently more or less susceptible to evaluation on a dispositive motion.* Subjective intent is typically difficult to resolve without a hearing whereas legal issues based on undisputed or historical facts typically could be resolved without the need for a hearing.
2. *Whether a particular Appellant could be expected to have difficulty responding to a dispositive motion.* An unrepresented Appellant unfamiliar with the process in this forum should not be expected to know the law and procedures as well as an Appellant either represented by counsel or appearing *pro se* but with extensive experience litigating in this forum.
3. *Whether the Appellant could be expected to encounter difficulty obtaining the evidence needed to oppose the motion.* An unrepresented Appellant who either has had no opportunity for discovery or who could not be expected to use the discovery process, is unable to respond effectively to any assertion by Respondent for which the facts and related documents are solely in Respondent's possession.

4. *Whether the Appellant has engaged in an extensive pattern of repetitive and/or predominantly frivolous litigation.* If this situation exists it suggests that use of a summary procedure to evaluate his/her claims is warranted before requiring the expenditure of resources required for hearing.

OSER (CZYNZAK-LYNE) DEC. NO. 32633 (WERC, 12/2008) (Citations omitted.)

We turn to applying the above factors to this case. To the extent the Respondent is contending Appellant's new duties are at the SO2 level, the present motion does not focus on subjective intent and instead relies on whether there are undisputed facts. The Respondent could prevail on summary judgment if the undisputed facts demonstrate that the position remains appropriately classified at the SO2 level. In addition, the Appellant is represented by counsel. Appellant is certainly in a position to know what duties he has performed and he would also be able to identify any areas of responsibility that are in dispute. There has been no showing that Appellant fits within the small group of persons who have engaged in an extensive or predominantly frivolous litigation so the final factor is not relevant to our analysis. Given these circumstances, we conclude that the Appellant is in a position to respond to the motion for summary judgment.

Is there a dispute of material fact relating to the proper classification for Appellant's duties at Dodge?

Neither party has supplied the Commission with a copy of the classification specifications applicable to this case. In a classification dispute, the specifications are comparable to administrative standards. Their application to a particular position involves first determining the duties assigned to the position and then exercising judgment as to which classification best describes the collection of duties.¹² Without the specifications, we are operating without the necessary guideposts and are unable to determine whether there is anything in the specifications at either level that would definitively exclude the Appellant's responsibilities at Dodge.¹³

¹²DNR & OSER (STEINKE), DEC. NO. 31103-A (WERC, 5/2005), AFF'D, STEINKE V. DNR ET AL., NO. 05CV408 (Wis. Cir. Ct. Sheboygan County Jan. 6, 2006).

¹³ The specifications might allow the Commission to gain some perspective relative to the following statement found in the affidavit of Daniel A. Westfield, Security Chief for the Division of Adult Institutions:

For all adult institutions, including KMCI and DCI, it is recognized that management may redistribute the duties and responsibilities and change shift assignments of supervising officers 1 and 2 without affecting the employees' classification or position. These reassignments are based on operational needs of the institution.

Not only is the Commission being asked to make a classification decision without access to the specifications but also the Appellant's position description of his duties at Dodge is not specific to his own duties. The decision as to whether or not there was a demotion hinges on the actual duties assigned to the position, rather than the words that might appear in the approved position descriptions.¹⁴ Appellant's position description does not indicate how much time he spends as relief for the shift commander rather than as relief in some other capacity. It also does not specify how often he supervises SO1 positions.

This key information is not documented elsewhere. The organization chart for Dodge¹⁵ shows that Galligan fills one of 12 Supervising Officer line positions. The brief description of duties, classification and name of the incumbent for each of the 12 line positions are as follows:

1 st Shift Line Supervisor	SO2 (Captain)	Larsen
1 st Shift Line Supervisor	SO1 (Lieutenant)	Jaeger
2 nd Shift Line Supervisor	SO1 (Lieutenant)	Peachey
2 nd Shift Line Supervisor	SO2 (Captain)	Thomas
1 st & 2 nd Shift Relief	SO2 (Captain)	C. Pearce
1 st & 2 nd Shift Relief	SO1 (Lieutenant)	Schouten
3 rd Shift Line Supervisor	SO2 (Captain)	Hellwig
3 rd Shift Line Supervisor	SO1 (Lieutenant)	Ponto
3 rd Shift Line Supervisor	SO1 (Lieutenant)	W. Pearce
Vac/Holiday/Transportation Relief	SO2 (Captain)	Galligan
Vacation/Holiday Relief	SO1 (Lieutenant)	Mariani
Vacation/Holiday Relief	SO1 (Lieutenant)	Beck

There is no obvious classification pattern in this list tending to indicate that the Appellant's duties as a relief officer must be performed by a SO2 rather than by a SO1.

Comments in the various affidavits submitted by the parties are inconsistent with a conclusion that there is no dispute the Appellant's duties at Dodge are at the SO2 level. Galligan asserts that his current position duties "are those of a relief Lieutenant" and that the "substantial majority of my position duties are those routinely performed by individuals in an SO1 Position":

The majority of time I am placed in Lieutenants positions for relief where I take orders from another Captain who is the Shift Commander. In April, May and June [2009] I was placed in Lieutenants Positions 33 times, a Captains Position 12 times and 20 times I was an extra Supervisor because they did not know where to assign me. In January, February and March again I was placed in Lieutenants Positions more than Captains Positions.

¹⁴ OLSON ET AL. V. DER, CASE NO. 92-0071-PC (PERS. COMM. 11/3/1994) (A signed position description is not conclusive and must be considered in conjunction with what the rest of the record reflects about the nature and level of complexity of appellants' work.)

¹⁵ The chart is marked as "Updated 1/4/2009".

Galligan's transportation responsibilities do not require us to conclude that he is working at the SO2 level. The Central Transportation and Intake Unit is in a different quadrant of the Dodge organization chart than the 12 Supervising Officer line positions. According to the chart, the Transportation/Intake Unit includes two SO1 (Lieutenant) positions that jointly supervise 25 employees, 12 of whom are assigned to Transportation and 13 to Intake. The two SO1s have commercial driver licenses and are assigned to operate the transport buses. They report directly to Captain Oleson who is in charge of the unit. Galligan is the relief Supervising Officer for bus duty. He was required to obtain a commercial driver license in order to serve as relief for the two SO1s. Overtime for operating a bus is offered to Lieutenants before Captains. Appellant's transportation responsibilities do not support an award of summary judgment because they are not definitively at the SO2 level.

Appellant also states that there was no vacant Captain position at Dodge when he was moved there. He states that after the move, DOC created (and then filled) another Captain position at Kettle Moraine from a Lieutenant position that originated at Dodge. This information also tends to undermine a conclusion that Appellant was performing Captain-level duties at Dodge.

Based on all of these factors, we have to conclude that there are material facts in dispute in terms of the proper classification of the Appellant's collection of duties at Dodge. Summary judgment must be denied.

A member of the Commission's staff will contact the parties in order to schedule a prehearing conference.

Dated at Madison, Wisconsin this 26th day of February, 2010.

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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