

Administrative Law: Basics and Recent Developments 2023

PRACTICE BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION (WERC)

Location: State Bar Center, Madison, Wisconsin

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1. WERC History and Structure

A. Labor Law Jurisdiction

Created as a three-person entity in 1930's to administer the Wisconsin Employment Peace Act (WEPA)

Jurisdiction and staff size increases with 1959 creation of the Municipal Employment Relation Act (MERA) and the 1965 creation of the State Employment Labor Relations Act (SELRA)

Multiple statutory changes followed which both expanded and then severely restricted public sector collective bargaining (2011 Acts 10 and 32)

WERC provides mediation, grievance arbitration, unfair labor practice, election and declaratory ruling services in public and private sectors. See Wis. Stats. 111.01 (WEPA), 111.70 (MERA) and 111.80 (SELRA) and administrative rules ERC 1-32, 40, 50, 70-71 and 80.

B. Civil Service Jurisdiction

With the abolition of the Wisconsin Personnel Commission in 2003, WERC assumed responsibility for administering a portion of Wisconsin's civil service law covering State employees.

WERC civil service jurisdiction specified in Wis. Stats. 230.36, 230.44(1), 230.45(1), and 321.68(4).

WERC civil service procedures established in Wis. Stats. 230.44(4) and 230.445 and administrative rules ERC 90-95.

C. Current WERC Structure

Single Commissioner, three attorneys, and two support staff.

***This outline and the speaker's related remarks are not necessarily those of the WERC.

2. Formal Practice Before WERC Hearing Examiners

Wis. Stat. 227.44-485 govern procedures for all civil service and certain labor cases (unfair labor practice, election and declaratory ruling matters).

Rules of evidence not generally applicable. See Wis. Stat. 227.45(1)

Authority of hearing examiner established. See Wis. Stat. 227.46

Discovery available in civil service appeals. See Wis. Stat. 227.45(7)

Attorneys can issue subpoenas. See Wis. Stat. 227.45(6m)

Attorney fees available for frivolous claims and defenses. See Wis. Stat. 227.483

Attorney fees available against State in limited circumstances. See Wis. Stat. 227.485.

3. Informal Practice Before WERC Hearing Examiners

In civil service appeals (the majority of which are disciplinary matters brought by pro se appellants), informality is the norm. Hearing may be telephonic or in person at the work site.

In civil service and labor matters, examiners encourage settlement efforts before (and sometimes during) the hearing.

The stringent 120-day time limit for completion of civil service disciplinary appeals may dictate scheduling and severely limit or preclude the opportunity to submit extensive written argument to the examiner or to the Commission.

4. Some Observations

The majority of a typical WERC hearing examiner's caseload consists of civil service appeals.

While Act 10 ended the ability to appeal discipline before a neutral decision-maker under a just cause standard for most public sector employees, State employees have retained that protection via access to the WERC.

In civil service appeals, the State is typically represented by an attorney.

Although WERC hearing examiners feel free to overturn or modify discipline imposed by the State, the State's disciplinary decisions are generally affirmed—particularly if the State has followed progressive discipline.

It is unusual for the Commission to reach an outcome that differs from the result and rationale proposed by the hearing examiner.

Except perhaps in a complex civil service disciplinary appeal, it is unlikely that representation by legal counsel will produce a better outcome for the State employee.

5. Some Practice Tips for Civil Service and Labor Cases

WERC has a very comprehensive website that may well answer many questions. <http://werc.wi.gov/>

Be prepared to make a concise opening and closing statement.

Although the State has the burden of proceeding and proof in disciplinary civil service matters, think long and hard before deciding not to have your client testify.

A PDF of your exhibits, with each exhibit labeled and numbered, is extremely helpful to the fact-finder.

Documents generally speak for themselves. Don't burden the record/insult the examiner by having them read by a witness unless necessary.

Edit any written submission. Less is more.