OFFICIAL

STATE OF WISCONSIN

PERSONNEL COMMISSION

RONALD C. JOHNSON,

Appellant,

v. *

Secretary, DEPARTMENT OF REVENUE,

Respondent.

Case No. 78-245-PC

DECISION

AND ORDER

NATURE OF THE CASE

Appellant in his appeal letter and the attachments submitted with the letter, asks the Commission, 1) to change his evaluation; and 2) to order disclosure of all discretionary performance awards, exceptional performance awards and any other awards given for the entire department and disclosure of all employes who received "superior" performance ratings, for 1977 and 1978. The appeal is before the Commission as a fourth step arbiter in an employe grievance procedure pursuant to s.230.45(1)(c), Wis. Stats., (1977). Respondent objects to Commission subject matter jurisdiction. The issue has been submitted for decision based on the briefs of the parties. This decision goes only to the jurisdictional questions raised.

OPINION

Whether appellant is entitled to some or all of the disclosure requested can be decided only if the Commission has jurisdiction of his appeal requesting a change in his performance evaluation. The Commission and its predecessor Personnel Board have decided very few cases involving the same or related issues. The grievance appeals decided by the Board are not persuasive since they are based on a statutory scheme materially different from the one under

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which this appeal was brought. One appeal has been decided under Ch. 230, Wis. Stats., (1977), Romanski v. DOR, 78-155-PC, 4/19/79. The Commission in Romanski exercised jurisdiction under s.230.45(1)(c), Wis. Stats., (1977), of an appeal of a grievance concerning a merit rating and merit increase. The respondent did not object to Commission jurisdiction and the Commission did not discuss any jurisdictional issues in its decision. An agency always has jurisdiction to determine its jurisdiction and is not estopped from reconsidering the scope of its subject matter jurisdiction.

Respondent objects to Commission jurisdiction on the ground that the grievance does not involve an allegation of agency violation, through incorrect interpretation or unfair application, of a personnel rule or civil service statute, or a function delegated by the Director of the State Bureau of Personnel to an appointing authority. Respondent asserts such allegations are necessary in order to appeal to the Commission at the fourth step, and relies on the grievance procedure set out in the Administrative Procedure Manual and DOR Administrative Directive 370-1.3 (a copy of which was made part of its Brief in Support of Motion to Dismiss). Appellant argues that the Commission has jurisdiction pursuant to s.230.44(1)(a), (b), or (d), wis. Stats., (1977).

Respondent relies on a grievance procedure and rules in continued effect under the transitional provisions of Ch. 196, s.129(4)(g), Laws of 1977, in the absence of new rules promulgated by the Secretary of the Department of Employment Relations pursuant to s.230.45(1)(c), Wis. Stats., (1977). Even though authorized by the transitional provisions, the operation of the grievance procedure and of some of the provisions of Wis. Adm. Code,

Ch. PERS 25, are modified by Ch. 230, Wis. Stats., (1977). The grievance procedure and Ch. PERS 25 were promulgated while Ch. 16, Wis. Stats., predecessor to Ch. 230, Wis. Stats., (1977), was in effect. Appeals from personnel actions delegated by the administrator to an appointing authority are now directly appealable under s.230.44(1)(b), Wis. Stats., (1977). The grievance procedure also authorizes such appeals, as "a function where the Director of the State Bureau of Personnel expressly delegated his authority to the appointing officer. . . . " A.P.M., Non-contractual Employe Grievance Procedures, s. I.D.1.b.(2). Using the same analysis as in Wing y. UW, supra, the Commission finds that portion of the A.P.M. superceded to the extent it is construed in the context of s.230.44(1)(a), Wis. Stats., (1977). Not every unfair application or incorrect interpretation of a civil service statute is appealable to the Commission. The pertinent question in this case is whether the subject matter of the appeal is related to conditions of employment which are grievable and appealable to the Commission under s.230.45(1)(c), Wis. Stats., (1977), and under the remaining sections of the grievance procedure.

A merit increase is a within pay range adjustment to an employe's base pay rate, s.230.12(5)(a) and (d), Wis. Stats., (1977). The language of the statute is clear. Additional discussion can add nothing to make it any clearer. The evaluation of employes is part of the determination of the wage rate and is therefore related to wages. The subject matter of this grievance is not appealable to the Commission as a final step arbiter.

¹See <u>Wing v. UW</u>, 78-137-PC, 4/19/79.

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The employe evaluation and the award of a merit increase is the decision of the appointing authority; s.230.12(5)(d) and s.230.06(1), Wis. Stats., (1977). The Commission does not have jurisdiction over this appeal pursuant to s.230.44(1)(a) or (b), Wis. Stats., (1977).

CONCLUSIONS OF LAW

- 1. The burden of proof to show that the Commission has jurisdiction of the appeal is on the party asserting jurisdiction.
- 2. Whether the Commission has jurisdiction of this appeal is a matter of law.
- 3. The Commission does not have jurisdiction over this appeal under s.230.45(1)(c), or under s.230.44(1), Wis. Stats., (1977).

ORDER

The respondent's motion to dismiss is granted and this appeal is hereby dismissed.

Dated <u>fune 27</u>,1980

STATE PERSONNEL COMMISSION

Charlotte M. Higbee

Commissioner

Donatok. Murphy

Commissioner

Gordon H. Brehm

Commissioner

AR:mqd