

STATE OF WISCONSIN

PERSONNEL COMMISSION

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KAREN E. SCHMELTZER,
 Appellant,

v. ,
 Secretary, DEPARTMENT OF REVENUE,
 Respondent.

Case No. 80-275-PC

* * * * *

OFFICIAL

DECISION
AND
ORDER

NATURE OF THE CASE

This matter is before the Commission on a question of subject-matter jurisdiction.

FINDING OF FACT

1. In an appeal filed with the Commission on August 18, 1980, the appellant stated, in part, as follows:

"This letter will serve as an appeal from the third step denial of my grievance regarding denial to me of a discretionary performance award in 1980 by reason of my having received a probationary increase in 1980. Additionally, I am appealing the action of the appointing authority, Wisconsin Department of Revenue, in taking this action."

CONCLUSION OF LAW

The Commission lacks jurisdiction over the subject matter of this appeal and therefore cannot hear and decide it on its merits.

OPINION

In a letter filed with the Commission on November 24, 1980, the appellant makes several of the same arguments presented in Williamson v. DOR, 80-303-PC, decided this date, a copy of which is attached hereto,

and which is responsive to the aforesaid arguments.

Ms. Schmeltzer makes the additional argument that Article I, Section 9 of the Wisconsin Constitution provides a "remedy for wrongs," and that "to be able to present my grievance only as far as the person who made the decision denies me a remedy for wrongs and is in violation of the Wisconsin Constitution."

Article I, Section 9 of the Wisconsin Constitution does not provide a basis for the Commission to hear this matter. See, e.g., Mulder v. Acme-Cleveland Corp., 95 Wis. 2d 173, 189, 290 N.W. 2d 276 (1980):

"That section, though of great importance in our jurisprudence, is primarily addressed to the right of persons to have access to the courts and to obtain justice on the basis of the law as it in fact exists. No legal rights are conferred by this portion of the Constitution."

ORDER

So much of this appeal as relates to the respondent's actions and decision with respect to discretionary performance awards as set forth in the petition filed September 15, 1980, is dismissed for lack of subject-matter jurisdiction. The Commission will hold this appeal open for a period of 30 days from the date this Order is signed. If the appellant wishes to pursue this appeal with respect to the allegation that the respondent failed to comply with the noncontractual grievance procedure by not conducting a meeting at the third step, she should file a statement to that effect in writing, with the Commission within 30 days of the date this Order is signed. If no such appeal is filed,

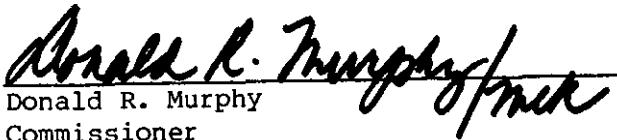
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the Commission then will enter an Order dismissing this appeal for
all purposes.

Dated 12/17, 1980

STATE PERSONNEL COMMISSION


Charlotte M. Higbee
Chairperson


Donald R. Murphy
Commissioner


Gordon H. Brehm
Commissioner

AJT:mek

Parties:

Ms. Karen E. Schmeltzer
3706 Newton Court
Middleton, Wisconsin 53562

Mr. Mark E. Musolf
125 S. Webster St.
Madison, WI 53702

"If it were not for the above described policy of Secretary Musolf I was informed and believe I would have gotten a DPA, since I was eligible for a merit increase after completing six months of my probation and was rated 'in the manner required' by my supervisor."

OPINION

Section 230.12(e), Stats., provides as follows:

"Appeal of discretionary performance award. An employe who is dissatisfied with the evaluation methodology and results used by the agency to determine any discretionary performance award, or the amount of such an award may grieve the decision to the appointing authority under the agency's grievance procedure. The decision of the appointing authority is final and may not be appealed to the Commission under §230.44 or 230.45(1)(c)."

In a brief filed with the Commission on October 15, 1980, the appellant argues:

"This appeal is not a result of dissatisfaction with the evaluation methodology or results. I was evaluated as performing 'in the manner required' and was satisfied with that evaluation. Subsequently, I was denied a discretionary performance award not as a result of the evaluation, but as a result of an arbitrary policy."

This decision is based in part on the reasoning set forth in Nikolai v. DOR, 80-319-PC, decided this date, a copy of which is attached hereto, and which is responsive to the aforesaid argument. The appellant makes several additional arguments in the aforesaid brief.

She argues that the denial of the award is "unfair treatment" in violation of §230.01(2), Stats. This argument was to the merits and not the initial question of whether the Commission has the authority to hear this matter on its merits. The same comment may be made with respect to the appellant's argument that the denial of discretionary performance awards "was not 'applied throughout Department to all employes

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similarly situated' as Helene Nelson stated in the denial of my grievance at step 3."

The appellant also argues that the Department did not follow the noncontractual grievance procedure in that the Secretary or his representative did not meet with her at the third step as required. The alleged failure of the agency to comply with the procedural requirements of the grievance procedure does not provide a basis for the Commission to hear the merits of the grievance (denial of a DPA) over the express statutory prohibition of the legislature.

It is likely that the appellant could have appealed to the Commission solely the alleged violation of the noncontractual grievance procedure. Such an appeal presumably would not be affected by §230.12 (5)(e), Stats., because it would not be an appeal of the denial of a discretionary performance award but rather an appeal of the alleged failure to hold a meeting at the third step of the grievance procedure. If such an appeal were to be heard by the Commission, it would appear that the sole tangible remedy that the Commission could provide would be to remand the matter back to the respondent to hold a meeting at the third step. Although the appellant's petition did not raise this procedural point, presumably it could be amended. Compare, §802.09(3), Stats.

If the appellant wishes to pursue this aspect of the case, she should so notify the Commission within 30 days of the date of this Order. It should be emphasized that pursuing this point would not result in the Commission reaching the merits (the denial of the discretionary performance award.)

ORDER

So much of the appeal as relates to the respondent's actions and decisions with respect to discretionary performance awards, as set forth in the petition filed September 15, 1980, is dismissed for lack of subject-matter jurisdiction. The Commission will hold this appeal open for a period of 30 days from the date this Order is signed. If the appellant wishes to pursue this appeal with respect to the allegation that the respondent failed to comply with the noncontractual grievance procedure by not conducting a meeting at the third step, she should file a statement to that effect, in writing, with the Commission, within 30 days of the date this Order is signed. If no such appeal is filed, the Commission then will enter an Order dismissing this appeal for all purposes.

Dated: December 17, 1980.

STATE PERSONNEL COMMISSION

PARTIES

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