STATE OF WISCONSIN PERSONNEL COMMISSION

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LYNN L. WILLIAMSON,

Appellant,

v.

Secretary, DEPARTMENT OF REVENUE,

Respondent.

Case No. 80-303-PC

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OFFICIAL

DECISION
AND
ORDER

NATURE OF THE CASE

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

FINDINGS OF FACT

1. The appellant filed a petition with the Commission on September 15, 1980. This stated in part as follows:

> "I respectfully petition the Personnel Commission to review and set aside a decision by Mark E. Musolf, Secretary of Revenue, apportioning the 1980 Discretionary Performance Awards (DPA's) and determining employes who (1) completed probation in May or June 1980, (2) were reclassified in May or June 1980, and (3) had reclassification pending for May, June, or July 1980, would get no DPA's ....
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> * * *
>
> I am in the first of Secretary Musolf's new categories, having completed the first six months of my probationary period May 17, 1980.
>
> * * *

CONCLUSION OF LAW

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

"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

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

Charlotte M. Higbee /mcr
Charlotte M. Higbee
Chairperson

Donald R. Murphy /mcr
Donald R. Murphy
Commissioner

Gordon H. Brehm /mcr
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AJT:jmg

STATE OF WISCONSIN PERSONNEL COMMISSION

* * * * * * * * * * * * * * * * * * *

RUSSELL A. NIKOLAI,

Appellant,

v.

Secretary, DEPARTMENT OF REVENUE,

Respondent.

Case No. 80-319-PC

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DECISION
AND
ORDER

NATURE OF THE CASE

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

FINDINGS OF FACT

This appeal was filed with the Commission on October 2, 1980. It stated, in part, as follows:

> "On August 13, 1980, I filed a Grievance Report, Step 1. The subject of that filing was the denial of a Discretionary Performance Award (DPA) based on a Department of Revenue policy that denied DPA's to employes, effective June 29, 1980, who 'received or are expected to receive salary increases for other reasons (reclassification or probationary increases) in May, June or July of this year' irregardless of their performance rating for the previous year. My performance rating was 'In the Manner Required' and other department employes who were rated similarly were awarded a 1.9% DPA (merit increase). My position was in the process of being reclassified and on July 28, 1980, I was interviewed for my proposed reclassification by Mr. George Corning of the State Division of Personnel.
>
> My Step 1 grievance contention was that my reclassification did not fall within the scope of the department's 3-month criteria in that I had not received a salary increase during that period. I also contended that DPA's and reclassification are two separate functions and the benefits of one function cannot offset the benefits of the other since

positions, not individuals, are the subject of reclassification and DPA's are earned by an individual through performance at his particular working level.

OPINION

Section 230.12(5)(e), Stats., provides:

> "Appeal of discretionary performance award. An employe who is dissatisfied with the evaluation methodology and results used by an 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)."

See also §§230.44(1)(e) and 230.45(2), Stats.

The final net product of the appointing authority's decisional process with respect to discretionary performance awards is the amount of the award. The amount can be fixed at from $Ø to the maximum permissible amount. An employe who is dissatisfied with the denial of a DPA may be said to be dissatisfied with the amount having been fixed at $Ø. Similarly an employe who feels that the DPA was inadequate essentially is dissatisfied with the amount having been fixed at a lesser level than he or she felt would have been appropriate. In either case the grievance runs to "the amount of such an award" and the statute prohibits appeal to the Commission.

It might be argued that the language "the amount of such an award" contemplates that there be some money actually awarded, and that the employe disputes the precise amount -- e.g., $.34 vs. $.36 per hour. A corollary of this interpretation might be that the statute does not address and therefore does not prohibit an appeal of the complete denial

of any DPA on the basis of some factor unrelated to performance, as apparently was the case here.

This interpretation flies in the face of plain language of the statute. An "amount" literally can be anything from zero on up. See Webster's Third New International Dictionary, Unabridged, 1961: "The total number or quantity." The Commission can discern no reason to depart from the literal language of the statutes.

The statute also prohibits appeals to the Commission by employes who may or may not be dissatisfied with the amount of the award but disagree with the evaluation used to determine the award. For example, an employe might be dissatisfied with a performance rating of "in the manner required." However, because, for example, of the allocation of funds for the agency, that employe's DPA amount might not be increased by a higher rating. Perhaps, even if the rating affected the DPA amount, an employe might be more concerned with the rating than the pay and would want to pursue an appeal of that rating even if he or she could not appeal the amount of the award. However, the statutory language, "dissatisfied with the evaluation methodology and results used by an agency to determine any discretionary performance award," also prohibits an appeal of that matter to the Commission.

The appellant argues that he is not appealing his evaluation but rather an allegedly arbitrary decision by the agency to deny DPA's to employes who received or were expected to receive salary increases from reclassifications or completion of probationary periods. He

also argues: "The wording 'amount of such an award' in the statutes, I believe, refers to the amount the department determines for each evaluation level and I have no argument with that." Letter from appellant dated October 13, 1980.

In the opinion of the Commission, §§230.12(5)(e), and 230.45(2), Stats., prohibit appeals to the Commission of all decisions on the amounts of DPA's. There is nothing in the statutory language that limits the restriction on appealability to instances in which the decision is based on performance evaluations. Rather, as indicated above, the language "dissatisfied with the evaluation methodology and results" provides a legislative restriction on appeals of an employe evaluation where the actual award may not be in question.

The second argument, that the language "amount of such an award" refers to the "amount the department determines for each evaluation level," finds no support in the plain language of the statute and is not persuasive.

The Commission wishes to point out that while in its opinion it lacks the authority to hear this appeal, the dismissal of this appeal has nothing to do with the merits of the action appealed. Rather, the Commission determines it does not have the authority to address the merits. Furthermore, it should be noted that the legislative restriction on appeals of discretionary performance award decisions does not affect the rights of employes to pursue complaints of discrimination with respect to such decisions where it is alleged that such decisions

involve discrimination because of age, race, color, handicap, sex, creed, national origin, ancestry, arrest record or conviction record. See §§230.45(1)(b), 111.33(2), Stats.

CONCLUSION OF LAW

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

ORDER

This appeal is dismissed for lack of subject-matter jurisdiction.

Dated: Dec 17, 1980. STATE PERSONNEL COMMISSION

Charlotte M. Higbee/mqd
Charlotte M. Higbee
Chairperson

Donald R. Murphy/mqd
Donald R. Murphy
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