

STATE OF WISCONSIN

PERSONNEL COMMISSION

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NORBERT HOLMBLAD

Appellant,

v.

Secretary, DEPARTMENT OF
INDUSTRY, LABOR & HUMAN
RELATIONS,

Respondent.

Case No. 84-0091-PC

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DECISION
AND
ORDER

This matter was filed with the Commission as an appeal from a third step decision in the non-contractual grievance procedure. The third step grievance report describes the grievance as follows:

My 6/5/84 Employ Performance evaluation was not done by methods specified in DILHR Administrative Practice PER 062:

1. position description was not updated prior to setting performance standards (see II.);
2. "other" evaluation criteria was not made known to me in sufficient time to meet the required level of performance (see III.B.);
3. there is no notation of the specific skills, knowledges, or other abilities I will develop and how I will get them (see III.D.);
4. Employe Evaluation Measurement Criteria that was used is of global or trait measures of performance (see II.F.);
5. not done with uniformity of all MIS positions in the bureau (see II.F.)

Relief Sought

Re-do the evaluation according to APM PER 062 or, if not possible because of timing, then replace my evaluation with a memo stating that evaluation bypassed in 1984 and giving the reasons.

The grievance was denied at the third step on June 19, 1984.

After the appellant had filed his appeal with the Commission, the respondent filed a jurisdictional objection, arguing that the

grievance involved a subject which may not be grieved to the Commission. Both parties were then provided an opportunity to file written arguments.

The Commission's jurisdiction over grievances is based upon §230.45(1)(c), Stats., which requires the Commission to:

Serve as final step arbiter in a state employe grievance procedure relating to conditions of employment, subject to rules of the secretary providing the minimum requirements and scope of such grievance procedure.

The rules of the Secretary of the Department of Employment Relations regarding the grievance procedure are set forth in Ch. ER 46, Wis. Adm. Code. Specifically, §46.07(1), Wis. Adm. Code, provides:

If the grievant is dissatisfied with the decision received from the appointing authority or designee at the third step under §ER 46.06(2)(c)2., the decision may be grieved to the commission only if it alleges that the employer abused its discretion in applying subch. II, ch. 230, Stats., or the rules of the administrator promulgated under that subchapter, or written agency rules, policies, or procedures, except that decisions involving the following personnel transactions may not be grieved:

- (a) A written reprimand;
- (b) A performance evaluation; or
- (c) The evaluation methodology used by an employe to determine a discretionary pay award, or the amount of the award.

The relevant language of the rule, "decision involving . . . [a] performance evaluation", is very broad and would, at least on a first reading of the rule, seem to include decisions leading up to the issuance of the evaluation as well as the ultimate evaluation decision itself. Otherwise, the rule could have been phrased to read: ". . . except that the following personnel decisions may not be grieved." The one problem with this expansive reading of the rule to include decisions prefatory to the evaluation result is that discretionary pay awards (DPA's) and

performance evaluations appear to be differentiated in the rule. The scope of the exception as it applies to DPA's includes both the "evaluation methodology" and the award amount. In contrast, there is no mention of "evaluation methodology" in paragraph (b) which refers to performance evaluations. The question then is one of deciding whether this distinction between DPA's and performance evaluations was intended to permit the Commission to review the "evaluation methodology" for performance evaluations but not for DPA's.

The language prohibiting the Commission from hearing grievances relating to DPA's appears to have been derived from §230.44(1)(e), Stats., which prevents the Commission from considering a direct appeal from a discretionary performance award:

This subsection does not apply to decisions of an appointing authority relating to discretionary performance awards under §230.12(5), including the evaluation methodology and results used to determine the award or the amount awarded.

In contrast, there is no comparable provision expressly barring the Commission from hearing direct appeals of performance evaluations.^{FN} Therefore, it seems reasonable to conclude that the drafter's intent in referring in §46.07(1)(c), Wis. Adm. Code, to both the evaluation methodology and the amount of the DPA was to be consistent with §230.44(1)(e), Stats., rather than to draw some distinction with the grievability of performance awards.

Another factor in interpreting the administrative code provision is a distinction that may be drawn between the terms "evaluation" and "award".

^{FN} It should be noted that the Commission has ruled it lacks the authority to hear a direct appeal of a performance evaluation, because there is no specific statutory provision in §230.44(1), Stats., giving the Commission authority to hear such an appeal. Welniak v. UW, 81-126-PC (6/3/81).


Webster's Third New International Dictionary defines award as "something that is conferred or bestowed upon a person" and defines evaluation as "the act or result of evaluating." The relevant distinction between the terms is that "evaluation" includes both the process and the end result, while "award" refers only to the end result. Given the relatively narrow definition of the term "award", it was necessary to expressly include the reference to "evaluation methodology" in §46.07(1)(c), Wis. Adm. Code, in order to include the process leading up to the issuance of the DPA. In contrast, it would have been redundant for paragraph (c) to read: "The evaluation methodology used by an employer to determine a performance evaluation, or a performance evaluation." Because the standard definition of the term evaluation includes both the act and the result of evaluating, it was unnecessary to make the language in §46.07(1)(b), Wis. Adm. Code, mirror that used in the subsequent paragraph.

Based upon the interpretation set out above, the rules adopted by the Secretary of Department of Employment Relations establishing the scope of the grievance procedure specifically prohibit the Commission from hearing the subject of this appeal. The appeal must therefore be dismissed.

ORDER

This matter is dismissed due to lack of subject matter jurisdiction.

Dated: August 31, 1984 STATE PERSONNEL COMMISSION


DONALD R. MURPHY, Chairperson


LAURIE R. McCALLUM, Commissioner

KMS:jab
ORDER

Parties

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