

STATE OF WISCONSIN

PERSONNEL COMMISSION

* * * * *

GARY HENDERSON,

Appellant,

v.

Secretary, DEPARTMENT OF
HEALTH AND SOCIAL SERVICES,

Respondent.

Case No. 85-0045-PC

* * * * *

DECISION
AND
ORDER

This matter was filed with the Commission as the final step in the non-contractual grievance procedure. Respondent has moved to dismiss for lack of jurisdiction.

The letter of appeal states, in part, as follows:

I have been a Captain at the Waupun Correctional Institution for three years. During that time I started as the 3rd shift relief Captain and worked my [way] progressively to the 1st shift Captain. On September 24, 1984, I returned from vacation and was told that I was reassigned to permanent 3rd shift by Mr. Borgen, the new Security Director. I was given no justifiable reasons for the reassignment at that time, but later when I filed a grievance I was given reasons that made no sense or could not be substantiated. The questions that I asked in the grievance were not addressed or answered at all.

The letter of appeal was received by the Commission on March 26, 1985.

Respondent contends that the subject of the grievance does not fall within §ER Pers. 46.02, Wis. Adm. Code, and therefore, is outside of the Commission's jurisdiction.

The Commission's authority as to grievances is founded on §230.45(1)(c), Stats., which provides:

(1) The Commission shall:

(c) 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, Department of Employment Relations regarding the grievance procedure are found in Ch. ER 46, Wis. Adm. Code. Those rules provide in part:

ER 46.03 Scope. (1) Under this chapter, an employe may grieve issues which affect an individual's ability to perform assigned responsibilities satisfactorily and effectively ...

* * *

ER 46.04 Management rights. (1) Nothing in this chapter is intended to interfere with the sole right of the employer to carry out its statutory mandate and goals.

(2) For purpose of this chapter, the management rights of the employer include, but are not limited to, the following:

* * *

(d) Hiring, promoting, transferring, assigning or retaining employes.

* * *

(f) Taking disciplinary action for just cause against an employe.

The action complained of by the appellant, a reassignment from the first shift to the third shift (i.e., assigning an employe) is within the scope of those management rights specifically listed in §ER 46.04(2)(d), Wis. Adm. Code. As such, the appellant is precluded by the existence of the Secretary's rules from utilizing the non-contractual grievance procedure for reviewing the action.

An additional contention of the appellant is that the respondent retaliated against him in violation of §ER 46.10, Wis. Adm. Code, which provides:

No employer may retaliate against a grievant, representative, or witness who participates or is scheduled to participate in proceedings, for using the grievance procedure. This section may be enforced by order of the secretary under §230.04(3), Stats.

This rule indicates that enforcement of violation is to be by the Secretary of the Department of Employment Relations and not by the Commission. It does not itself provide a jurisdictional basis for any review by the Commission.

The question remains whether this matter may be heard by the Commission using a statutory basis other than §230.45(1)(c), Stats.

The action complained of is neither a decision of the Administrator, Division of Merit, Recruitment and Selection nor the Secretary of the Department of Employment Relations. §230.44(1)(a) and (b), Stats. Appellant alleges that the action constituted some form of discipline:

I am also alleging by statements of facts that the reassignment was intended as disciplinary as has been the practice at the Waupun Correctional Institution. Other Captains have been hired and have been asked for the 3rd shift but were told that it was not available to them, why if this is not disciplinary in nature. I was not given any type of due process and management did not follow the guidelines for just cause under chapter 264.

While the Commission can review certain forms of discipline under §230.44(1)(c), Stats., reassignment is not one of those types of discipline enumerated in the statute as being appealable. The reassignment is also not related to a hiring decision under §230.44(1)(d), Stats.

Among the various arguments identified by the appellant and relating to the jurisdictional question is the contention in the letter of appeal that because appellant's replacement on the first shift was a younger employe, age discrimination may have occurred. The Commission does have jurisdiction over complaints of age discrimination pursuant to §230.45(1)(b), Stats. However, the appellant has not filed a complaint form with the Commission. The conference report for a prehearing conference held in this matter on June 26,

1985, states: "The appellant was informed of the time limits for filing a complaint of discrimination." Given that language and the clear opportunity to file that it described, the Commission will not construe appellant's letter of appeal as an attempt to file a complaint of age discrimination.

Appellant also argues that respondent violated the statement of policy found in §230.01(2), Stats. This statement is only a statement of policy and does not, by itself generate any jurisdiction by the Personnel Commission over any alleged violation of the policy.

Finally, appellant argues that respondent has violated §230.80, Stats., which is found within that subchapter of Ch. 230, Stats., entitled "Employee Protection" and often referred to as the Whistleblower Law. In order to pursue a complaint of retaliation before the Commission (§230.45(1)(gm), Stats.) under that subchapter, an employe must have made a disclosure, assisted in a whistleblower case or been perceived as having done so, and the complaint must have been filed within 60 days of the alleged retaliation, among other requirements. Elsewhere in his written argument filed with the Commission, the appellant alleges that he was retaliated against for having filed grievances on disputed issues relating to overtime. It is at least possible that this activity could be determined to be a disclosure under the Whistleblower Law. The Commission will provide the appellant with a period of 15 calendar days from the date this order is mailed in which to consider the requirements of Subch. III, Ch. 230, Stats., and to file^{FN} any Whistleblower complaint utilizing the appropriate form.

^{FN} The term "file" means that the complaint must actually be received by the Commission within the 15 day time period.

ORDER

The respondents motion to dismiss is granted, effective 15 days from the date this order is mailed to the parties, thereby permitting appellant to file a Whistleblower complaint. Any such complaint will be assigned a separate case number.

Dated: August 15, 1985

STATE PERSONNEL COMMISSION


DENNIS P. MCGILLIGAN, Chairperson


DONALD R. MURPHY, Commissioner


LAURIE R. MCCALLUM, Commissioner

KMS:jgf
JGF002/2

Attachment

Parties

Gary Henderson
P.O. Box 55
Manchester, WI 53945

Linda Reivitz
Secretary, DHSS
P.O. Box 7850
Madison, WI 53707