

STATE OF WISCONSIN

PERSONNEL COMMISSION

\* \* \* \* \*

LINDA S. MILLER,

Appellant,

v.

Secretary, DEPARTMENT OF  
HEALTH AND SOCIAL SERVICES

Respondent,

Case No. 87-0209-PC

\* \* \* \* \*

INTERIM  
DECISION  
AND  
ORDER

On November 10, 1988, respondent DHSS filed a motion to dismiss portions of this appeal on the grounds that the Commission lacked subject matter jurisdiction. Neither party requested a hearing on the motion and the issues presented by the motion were submitted to the Commission on briefs. The briefing schedule was completed on January 6, 1989.

The following facts appear to be undisputed and were obtained from the documents filed by the parties with the Commission.

1. At all times relevant to this matter, appellant has been employed by respondent in a position classified as an Administrative Assistant 4.
2. On December 16, 1987, appellant filed a letter of appeal with the Commission. In such letter, appellant characterized her appeal as a request that the Commission review respondent's decisions relating to an internal grievance appellant had filed with respondent and appellant enclosed copies of the documents relating to such grievance as it had been filed and decided at the first

and second steps. The specific actions of respondent involving appellant which appellant referenced in such grievance include the following: comments allegedly made by appellant's supervisor to the effect that appellant's sick leave use was excessive; the alleged application of a different compensatory time policy by appellant's supervisor to appellant than to other staff in the unit; the alleged failure of appellant's supervisor to follow the proper procedure regarding her evaluation of appellant's performance pursuant to the PPD (Performance Planning and Development) process in 1986 and 1987; the results of the PPD process, i.e., the evaluation of appellant's performance by appellant's supervisor in 1986 and 1987; respondent's failure to award appellant a Discretionary Performance Award (DPA) in 1986 and 1987; and the assignment of duties to appellant's position and the removal of duties from appellant's position.

3. In her brief of December 16, 1988, appellant contends that the changes in the duties and responsibilities of her position referenced in her letter of appeal constituted an actual or constructive demotion.

This appeal reaches the Commission as a fourth-step grievance. Section 230.45(1)(c), Stats., provides that the Commission shall:

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.

Section ER 46.03, Wis. Adm. Code, provides as follows, in pertinent part:

**Scope.** (1) Under this chapter, an employe may grieve issues which affect his or her conditions of employment, including any matter on which the employe alleges that coercion or retaliation has been practiced against the employe except as provided in sub. (2).

(2) An employe may not use this chapter to grieve:

(a) A personnel action or decision of the administrator or the secretary that is directly appealable to the personnel commission under s. 230.44, Stats.;

\* \* \* \* \*

(c) A demotion, suspension, discharge, removal, layoff or reduction in base pay;

\* \* \* \* \*

(j) A condition of employment which is a right of the employer as defined in s. ER 46.04;

Section ER 46.04, Wis. Adm. Code, provides, in pertinent part:

**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 the purpose of this chapter, the management rights of the employer include, but are not limited to, the following:

(a) Utilizing personnel, methods and means to carry out the statutory mandate and goals of the agency.

(b) Determining the size and composition of the work force.

(c) Managing and directing the employees of the agency.

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

Section ER 46.07, Wis. Adm. Code, provides, in pertinent part:

**Personnel Commission.** (1) If the grievant is dissatisfied with the decision received from the appointing authority or designee at the third step under s. 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, subchs. I and II, ch. 230, Stats., or the rules of the secretary promulgated under those subchapters, or written agency rules, policies, or procedures, except that decisions involving the following personnel transactions may not be grieved to the commission:

(a) A written reprimand;

(b) A performance evaluation; or

(c) The evaluation methodology used by an employer to determine a discretionary pay award, or the amount of the award.

Appellant has included within the scope of her grievance allegations relating to the procedure followed by appellant's supervisor in evaluating appellant's performance as part of the PPD process in 1986 and 1987; the actual evaluation of appellant's performance by her supervisor pursuant to the PPD process in 1986 and 1987; and respondent's failure to award appellant a DPA in 1986 and 1987. It is clear from the language of §ER 46.07, Wis. Adm. Code, that the Commission does not have jurisdiction to hear appellant's allegations regarding the actual evaluation of her performance or her failure to receive a DPA. It is not clear, however, whether the Commission has jurisdiction to hear the allegations regarding the procedures followed by appellant's supervisor in evaluating appellant's performance. Respondent relies upon the language of §230.45(2), Stats., in arguing against the existence of such jurisdiction. The language of §230.45(2), Stats., states as follows:

Subsection (1)(c) does not apply to an employe who, using the agency grievance procedure, grieves his or her dissatisfaction with the evaluation methodology and results used to determine any discretionary performance award or the amount of such an award. Any such employe grievance shall be settled on the basis of the appointing authority's decision.

This language applies only to the evaluation methodology and results used to determine a discretionary performance award and not to the evaluation methodology and results used to complete a performance evaluation. The question then becomes one of determining whether the language of §ER 46.07, Wis. Adm. Code, should be read to exclude decisions of the appointing authority relating to the methodology used in completing a performance evaluation from the list of those which may be grieved to the Commission pursuant to §230.45(1)(c), Stats. Section ER 46.07(1)(c), Wis. Adm. Code, specifically states

that the evaluation methodology as well as the result of the DPA process may not be grieved to the Commission. A parallel provision does not exist with regard to the performance evaluation process. However, §ER 45.02(2), Wis. Adm. Code, defines "performance evaluation" as "a continual process of identifying, measuring and developing job-related employe performance." It would appear that the term "performance evaluation" as used in §ER 46.07(1)(b), Wis. Adm. Code, refers to both the methodology used to complete the process as well as to the result of the process and the Commission so concludes. This is consistent with the Commission's decision in Holmblad v. DILHR, Case No. 84-0091-PC (8/31/84). As a result, the Commission concludes that, pursuant to §ER 46.07, Wis. Adm. Code, it does not have jurisdiction to hear and decide an appeal of the methodology used by appellant's supervisor in completing the PPD process in 1986 and 1987.

Appellant has also appealed the assignment of duties to and the removal of duties from her position. Such allocation of duties among the positions of an agency are considered a management prerogative within the meaning of §ER 46.04, Wis. Adm. Code, i.e., within the scope of management rights to utilize personnel to carry out the statutory mandate and goals of the agency (§ER 46.04(2)(a), Wis. Adm. Code) and to manage and direct the employees of the agency (§ER 46.04(2)(c), Wis. Adm. Code). The Commission does not, therefore, have jurisdiction to hear and decide this aspect of the appeal pursuant to §230.45(1)(c), Stats.

Appellant also alleges that she has been actually or constructively demoted as a result of actions taken by respondent in relation to the assignment of duties to and removal of duties from her position. However, in the context of a §230.45(1)(c) appeal, the Commission does not have jurisdiction to hear and

decide, pursuant to §ER 46.03(2)(c), Wis. Adm. Code, a "demotion, suspension, discharge, removal, layoff or reduction in base pay."

The Commission does have jurisdiction, pursuant to §230.44(1)(c), Stats., to hear and decide an appeal of an actual or constructive demotion. However, such authority would exist only if such appeal were filed within the 30-day period specified in §230.44(3), Stats. Appellant bases her appeal of the allegedly constructive demotion on her relinquishment of her position subtitle in the fall of 1985, the hiring of a new Assistant WIC Director in 1986, and the assignment of duties to and removal of duties from appellant's position on or before August 3, 1987, the date appellant filed her grievance at the first step. Appellant filed her appeal with the Commission on December 16, 1987. Obviously, more than 30 days elapsed between August 3, 1987, and December 16, 1987, and appellant's appeal of her alleged demotion was not timely filed and may not be heard and decided by the Commission.

Appellant includes in her grievance the fact that appellant's supervisor allegedly made comments to the effect that appellant's sick leave use was excessive. Appellant fails to state how this aspect of the grievance satisfies the requirements of §ER 46.07(1), Wis. Adm. Code, i.e., fails to state what type of "decision" by respondent is involved in this allegation, and what statute, rule, policy, or procedure specified in §ER 46.07, Wis. Adm. Code, appellant alleges respondent abused its discretion in applying. The Commission cannot find that respondent made any "decision" in this regard, i.e., appellant has failed to allege that respondent took any action based on such comments. In the absence of a decision to review, the Commission is not able to determine what statute, rule, policy, or procedure could support a finding of jurisdiction pursuant to §ER 46.07, Wis. Adm. Code.

Finally, appellant alleges in her grievance that respondent applied a different compensatory time policy to appellant than to other staff in the unit. The respondent has not raised a jurisdictional objection to this allegation.

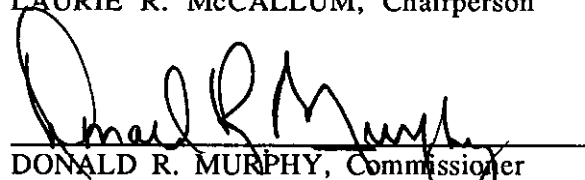
ORDER

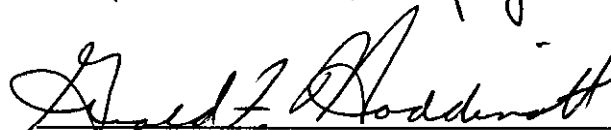
The respondent's motion to dismiss portions of this appeal for lack of subject matter jurisdiction is granted. So much of appellant's grievance that relates to comments allegedly made regarding excessive use of sick leave, to the methodology used to complete and to the results of the PPD process in 1986 and 1987, to appellant's failure to receive a DPA in 1986 and 1987; to the alleged assignment of duties to and removal of duties from appellant's position; and to appellant's allegations that she was demoted, are dismissed. So much of appellant's grievance that relates to the alleged application of different compensatory time policies is not dismissed and shall continue to be processed by the Commission.

Dated: February 8, 1989

STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

  
DONALD R. MURPHY, Commissioner

  
GERALD F. HODDINOTT, Commissioner

LRM/lrm

Parties:

Linda S. Miller  
4977 Hahn Road  
DeForest, WI 53532

Patricia Goodrich,  
Secretary, DHSS  
P. O. Box 7850  
Madison, WI 53737