

TERRY SCHMIDT,

Appellant,

v.

Secretary, DEPARTMENT OF  
CORRECTIONS,

Respondent.

Case No. 91-0253-PC

DECISION  
AND  
ORDER

This matter is before the Commission on the respondent's motion to dismiss for lack of subject matter jurisdiction. The parties have filed written arguments and the following findings appear to be undisputed.

#### FINDINGS OF FACT

1. During the period from February of 1984 until July of 1989, the appellant was employed as an officer at the Green Bay Correctional Institute (GBCI).
2. On July 21, 1989, the appellant left his position at GBCI as a Correctional Officer 2 which was a represented position within a collective bargaining unit.
3. On June 17, 1991, the appellant was reinstated to a position as Correctional Officer 2 at the Racine Correctional Institute. Because he was being reinstated, the appellant was placed on permissive probation for a period of six-months.
4. On December 6, 1991, the appellant's employment was terminated, shortly before his six-month probationary period would have ended.

#### CONCLUSION OF LAW

The Commission lacks subject matter jurisdiction over this matter.

#### OPINION

The respondent's motion to dismiss is based upon the following contention:

Under section 111.93(3), Stats., the discharge of a represented employee is bargainable and thus may be appealed only pursuant to the terms of the applicable contract, not section 230.44, Stats. See Walsh v. UW, Case No. 80-109-PC. Such an appeal is to an arbitrator, not the Commission.

It has previously been held that the Commission lacks subject matter jurisdiction over an appeal of a probationary termination. Board of Regents v. Wis. Personnel Comm. 103 Wis. 2d 545, 309 N.W. 2d 366(Ct. App., 1981). This ruling was based upon an analysis of the source of the Commission's jurisdiction over discharges, found in §230.44(1)(c), Stats:

If an employe *has permanent status in class...* the employe may appeal a demotion, layoff, suspension, discharge or reduction in base pay to the commission, if the appeal alleges that the decision was not based on just cause. (emphasis added)

An employe who once held permanent status in class as a Correctional Officer 2 cannot be said to have permanent status in class during a subsequent probationary period imposed upon his reinstatement to another Correctional Officer 2 position. The appellant's status is described in §ER-Pers 16.04(1)(b), Wis. Adm. Code:

A person who is reinstated to a different employing unit in the same agency from which the person earned reinstatement eligibility may be required by the appointing authority to serve a probationary period. If not required to serve a probationary period, the employe shall immediately attain permanent status in class. If required to serve a probationary period, the employe may be terminated from the service by the appointing authority during the probationary period without the right of appeal.

Because the appellant was serving a probationary period upon reinstatement, he did not have permanent status in class and the Commission lacks the authority to hear an appeal under §230.44(1)(c), Stats., from the termination of his employment. Janeck v. UW, 88-0035-PC, 8/2/88.

If, for the sake of argument, the Commission concluded that the appellant did have permanent status in class in his position at Racine Correctional Institution, the net effect of §§111.93(3) and 230.34(1)(ar), Stats., would be to require him to use the contractual grievance procedure rather than to file an appeal under §230.44, Stats.

The Commission notes that in his letter brief dated February 5, 1992, the appellant alleges that his termination was motivated by the fact that he is a Christian and his supervisor is an atheist. In the event the appellant wishes to pursue a claim of discrimination based upon creed with respect to the termination decision, he may file a charge of discrimination with the Commission and it will be processed under the provisions of the Wisconsin Fair Employment Act. A complaint form and instructions will be supplied to the appellant along with information setting forth the time limits for filing.

ORDER

This matter is dismissed for lack of subject matter jurisdiction. The dismissal of this matter has no effect on the authority of the Commission to process a charge of discrimination should the appellant file a timely charge.

Dated: February 21, 1992

STATE PERSONNEL COMMISSION

  
LAURIE R. MCCALLUM, Chairperson

KMS:kms

  
DONALD R. MURPHY, Commissioner

  
GERALD F. HODDINOTT, Commissioner

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