

STATE OF WISCONSIN

PERSONNEL COMMISSION

* * * * *

ELIZABETH J. GALLENBECK,

Appellant,

v.

Executive Director, WISCONSIN
LOTTERY,

Respondent

Case Nos. 92-0116, 0119-PC

* * * * *

RULING ON
RESPONDENT'S
MOTION TO
DISMISS

On April 20, 1992, respondent filed a Motion to Dismiss for lack of subject matter jurisdiction. Neither party requested an evidentiary hearing on the motion. A briefing schedule was established by the hearing examiner and was completed on May 8, 1992. The following findings of fact appear to be undisputed and are made solely for the purpose of deciding the Motion to Dismiss:

1. On March 3, 1992, appellant filed a fourth-step grievance with the Commission which was assigned Case No. 92-0116-PC. The subject of this grievance was an incident which allegedly occurred on November 8, 1991, and during which Mr. Fitzsimmons, one of appellant's supervisors, allegedly accused appellant of lying in regard to a question he had asked her relating to her starting time on November 6, 1991. In her grievance, appellant stated:

This comment by Mr. Fitzsimmons is clearly a false and malicious statement, which directly violated the Wisconsin Lottery's Work Rule Personal Actions and Appearance Section and which caused undue emotional distress to myself and resulted in my having to take sick leave on Friday, November 8, 1991, as I was unable to perform my job duties, and the filing of this grievance.

2. On March 3, 1992, appellant filed a fourth-step grievance with the Commission which was assigned Case No. 92-0119-PC. The subject of this grievance was an incident which allegedly occurred on November 8, 1991, and during which Mr. Fitzsimmons, as appellant was waiting for another employee to provide her with a grievance form, allegedly ordered appellant to get to

work and told her that she would be able to file a grievance when she had time. In her grievance, appellant stated:

This was stated in an intimidating manner and with the use of threatening gestures, clear violations of the Wisconsin Lottery's Work Rule Personal Actions and Appearance Section. Violations which in the end caused undue emotional distress, interference in the Wisconsin Lottery Grievance Procedure For Nonrepresented Employees and the inability of an employee to complete their assigned job duties.

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, in pertinent part:

(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:

* * *

(h) an oral reprimand.

Section ER 46 04, Wis. Adm. Code, provides, in pertinent part:

(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 purposes 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.

* * *

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

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, . . .

Appellant has failed to specify what statutes or administrative rules respondent is alleged to have violated or abused its discretion in applying. The Commission concludes then that appellant's grievances are based on an alleged abuse of discretion by respondent in applying its own work rule, specifically the work rule cited by appellant in her grievance relating to "Personal Actions and Appearance." This allegation would fall within the language of §46.07(1), Wis. Adm. Code, and confer jurisdiction on the Commission unless the nature of the incident which was grieved fits within one of the exceptions to the scope of the grievance process cited in §§46.03 and 46.04, Wis. Adm. Code

Respondent argues that the "lying statement" which is the subject of the first grievance is essentially an oral reprimand which would fall within the exception cited in §ER 46.03(h), Wis. Adm. Code; and that the "get back to work" statement and the statement that appellant would be able to file a grievance when she had time which are the subject of the second grievance are essentially instances of the employer managing and directing the employees of the agency within the meaning of the exception cited in §ER 46.04(2)(c), Wis. Adm. Code. However, the Commission concludes that a spontaneous admonition from a supervisor, such as the "lying statement" under consideration here, does not rise to the level of an oral reprimand since that term is understood within the state's civil service system to denominate a more formal and deliberate disciplinary action. The Commission does agree with respondent that the statements allegedly made to appellant during the second incident constituted management directives within the meaning of §ER 46.04, Wis. Adm. Code.

Appellant also alleges that the statements made by Mr. Fitzsimmons during the incident which is the subject of the second grievance were made in

a threatening and intimidating manner. Since appellant does not allege a violation of any statute or administrative rule in this regard, the Commission will assume that appellant is alleging that respondent abused its discretion in applying an agency work rule within the meaning of §ER 46.07, Wis. Adm. Code. In particular, appellant makes specific reference in her second grievance to the "Wisconsin Lottery's Work Rule Personal Actions and Appearance Section." In the absence of any evidence that the cited work rule does not exist or could not be applied to the alleged fact situation under consideration here, and in the absence of any indication that one of the exceptions to the application of the noncontractual grievance process applies here, the Commission concludes that, from the information available, it appears that the Commission has jurisdiction over this aspect of appellant's grievance.


Order

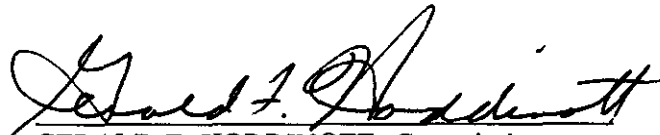
The Motion to Dismiss is granted in part and denied in part consistent with the above decision.

Dated: June 24, 1992 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

LRM/lrm/gdt/2


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner