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ARLENE L. RENTMEESTER,
 Appellant,

v.

Executive Director, WISCONSIN
 LOTTERY [WISCONSIN GAMING
 COMMISSION],
 Respondent.

Case Nos. 92-0152-PC
 92-0166-PC

* * * * *

DECISION
 AND
 ORDER

These matters are before the Commission on the respondent's motion to dismiss for lack of subject matter jurisdiction. The parties were provided an opportunity to file written arguments.

FINDINGS OF FACT

Case No. 92-0152-PC

1. On March 19, 1992, the appellant filed a 4th step grievance with the Commission. The grievance referenced information provided in a letter, dated January 8, 1992, from the appellant to Cyneth Dahm, respondent's Affirmative Action Officer. That letter stated:

In your capacity as Personnel/Affirmative Action Officer of Wisconsin Lottery, I am informing you of a Charge of Harassment against John Fitzsimmons, Co-acting District Sales Manager of the Green Bay office. This charge has been founded on the basis of unwelcomed verbal abuse that interferes with my work performance and that creates an intimidating, hostile and offensive work environment. According to the Wisconsin Lottery Affirmative Action Plan, this type of behavior warrants investigation and follow-up.

This morning, at approximately 8:00 AM, in the Green Bay district vault, I checked out my lottery ticket orders with vaultkeeper, Art Piper. I began to routinely verify pack/invoice numbers and to box the orders for loading when the vault telephone rang and Mr. Fitzsimmons answered and said it was Diane Harmelink for me. He handed me the telephone and after a brief greeting with

Ms. Harmelink, Wisconsin Lottery Deputy Director, I asked her to hold while I went to my office to check my calendar. I then asked Mr Fitzsimmons to transfer her call to the inner office to complete my conversation. Upon returning to the vault and while waiting for the use of a dolly to load my tickets, Mr. Fitzsimmons launched a verbal attack against me for leaving my ticket orders "unsecured" during the time of the telephone call. I asked what he meant by "unsecured" and he stated there was no one there to watch them, I then asked Mr. Piper if he was watching my tickets during my absence and he replied, "I watch everything". When Mr Fitzsimmons heard this, he sarcastically stated again that my tickets were left unsecured and in a threatening manner said "THIS WILL NOT HAPPEN AGAIN". I told him that he was the one who gave me the telephone when Ms Harmelink called and he was the one who transferred that call to my office. If this were going to make my tickets unsecured, he should NOT have done that. During this entire incident, the tickets remained on my order table in the "secured" portion of the vault and in plain view of both Mr. Piper and Mr. Fitzsimmons. Mr. Piper did not allow waiting FSR Sue Gerstner or LTE Bob Conrad to enter that area while I was gone. Mr. Fitzsimmons continued to verbally attack me in front of the others stating, "There are enough problems around here". I told him that he was unnecessarily harassing me and attempting to intimidate me. When I began taking the tickets out to my van, a portion of the orders had to remain on the table, which is a common occurrence for many FSRs due to ticket volumes. Before I left the secured area of the vault with my first load, I asked Mr. Fitzsimmons if my remaining tickets were now considered "unsecure" and he replied, "NO, while you load your van, I watch your tickets". It seemed apparent to me that if he could watch my tickets while I loaded my van, that he could also watch those same tickets while I answered a telephone call from the Deputy Director and this entire conversation was unwarranted.

As I began reporting this information to Co-acting District Sales Manager, Steve Sonnenberg, in his office, Mr Fitzsimmons entered briefly and again continued the attack. When he left to re-enter the vault door, he shouted that I should do my job. Mr Sonnenberg then received a telephone call and I left his office to return to mine. A short time later, Mr. Sonnenberg approached me in my office and we began to further discuss the incident. He was very empathetic to my position and encouraged me to file a written complaint and notify Ms Harmelink of Mr. Fitzsimmons' behavior.

Mr. Fitzsimmons' unprofessional management style and inability to assess appropriateness of a situation is in direct violation of the WISCONSIN LOTTERY WORK RULES, Work Performance Section, "Discourtesy in dealing with department employees, other agencies, or the public". It is also in violation of the WISCONSIN LOTTERY AFFIRMATIVE ACTION PLAN, Prohibitions of Discrimination and Harassment Section, "The Wisconsin Lottery

seeks to eliminate and prevent discrimination and harassment caused by agency policies, co-workers or supervisors and will take appropriate action against those who engage in discriminatory or harassing behavior". Under NO circumstances should Mr. Fitzsimmons be allowed to remain in his position as Co-acting Sales Manager.

This type of aggressive behavior is just another example of Mr Fitzsimmons' continued sarcastic, intimidating, threatening, degrading and humiliating harassment in retaliation against me and others who are party of the Class Action Lawsuit against Wisconsin Lottery Management

2. The grievance was denied at the 3rd step on February 20, 1992. The 3rd step answer included a conclusion that the comments made by Mr. Fitzsimmons to the appellant did not constitute an oral reprimand.

3 At the 4th step, the appellant has identified the following as "relief sought":

That a thorough and impartial investigation of this incident be conducted by non-lottery personnel.

That Mr. Fitzsimmons be removed from the position of Co-acting District Sales Manager for this type of unprofessional behavior and violation of Wisconsin Lottery Work rules and Affirmative Action Plan.

That information regarding this compliant/grievance be placed in Mr. Fitzsimmons personnel file

That I receive a written apology from Mr. Fitzsimmons and a copy of such also be placed in his personnel file.

That I be reimbursed for any reasonable attorney fees incurred because of harassment complaints.

That retaliation against me for filing a complaint is prohibited.

Case No. 92-0166-PC

4. On March 25, 1992, the appellant filed another 4th step grievance with the Commission. This grievance arose from the decision to change the appellant's work assignment from Route 3037 to Route 3028 for Wednesday, October 16, 1991. Appellant stated that as a consequence of the change, she had to take 8 hours of sick leave in order to keep a doctor's appointment at 3.30 p.m

on October 16th. As relief, she sought reinstatement of the 8 hours of sick leave.

CONCLUSION OF LAW

The Commission lacks jurisdiction over Case No. 92-0166-PC.

OPINION

The respondent has raised several different jurisdictional objections to both of these cases.

The Commission's jurisdiction over non-contractual grievances is based on §230.45(1)(c), Stats., which provides that the Commission shall. "Serve as final step arbiter in the state employe grievance procedure established under § 230.04(14)." According to §230.04(14), Stats, the Secretary of the Department of Employment Relations "shall establish, by rule, the scope and minimum requirements of a state employe grievance procedure relating to conditions of employment "

The Secretary of DER has established the scope of the grievance procedure in §ER 46.03, Wis. Adm. Code:

- (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 ;
 - (b) An action delegated by the administrator or by the secretary to an appointing authority;
 - (c) A demotion, suspension, discharge, removal, layoff or reduction in base pay;
 - (d) A personnel action after certification which is related to the hiring process;

* * *

- (h) An oral reprimand;

* * *

(j) A condition of employment which is a right of the employer as defined in s ER 46 04; or

(k) Any matter related to wages, hours of work, and fringe benefits.

Section ER 46.04, Wis. Adm. Code, provides

(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 employes of the agency.

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

In Case No 92-0166-PC, the appellant seeks to grieve the decision to give her a particular route assignment. This decision clearly falls within the scope of the definition of management rights described in §ER 46 04(2)(c) and (d), of assigning, managing and directing employes. Therefore, the Commission lacks jurisdiction to hear Case No. 92-0166-PC

Respondent raises a variety of jurisdictional objections in Case No. 92-0152-PC One contention is that the subject of the appellant's grievance is statements by Co-acting District Sales Manager John Fitzsimmons which constitute oral reprimands and are, therefore, specifically made non-grievable by §ER 46.03(2)(h) However, the Commission is not in a position to characterize the statements attributed to Mr. Fitzsimmons by the appellant as oral reprimands where there is neither an affidavit nor testimony from Mr Fitzsimmons and where the respondent's deputy director, as part of the 3rd step answer to the grievance concluded Mr. Fitzsimmons comments were *not* an oral reprimand.

Respondent also contends that the statements made by Mr. Fitzsimmons fall within the scope of management rights. Some of Mr Fitzsimmons' comments to the appellant during the January 8th incident as described by the appellant are properly characterized as providing management and direction to the appellant. This is true of comments which may have specifically directed the appellant to do her job and to not leave the vault during the check-out procedure ("This will not happen again."). However, based solely upon the documents before it, the Commission cannot conclude that *all* of the alleged statements by Mr. Fitzsimmons fall within the scope of providing management and direction to the appellant. At least one ("There are enough problems around here") falls outside of this category and the appellant's grievance does not attempt to provide a verbatim transcript of some of Mr. Fitzsimmons' other statements. There is no affidavit or testimony from Mr. Fitzsimmons. Therefore, the Commission will deny the respondent's motion, without prejudice, with respect to whether all of Mr. Fitzsimmons' comments fell within the scope of management rights.

Respondent's third jurisdictional objection in Case No. 92-0152-PC, is that the appellant has failed to allege the respondent has violated a civil service rule or statute. In support of its objection, the respondent recites language from its grievance procedure which specifies that the Personnel Commission serves as the 4th step in the grievance procedure for nonrepresented employees "if the grievant alleges a violation of Wisconsin Statute or Wisconsin Administrative Code." This language from respondent's grievance procedure is more restrictive than the following language in §ER 46.07(1).

If the grievant is dissatisfied with the decision received from the appointing authority or designee at the third step..., 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....

As was already noted above, the rules of the Secretary of the Department of Employment Relations (DER) establish the "scope and minimum requirements" of the grievance procedure. Those rules, rather than respondent's documentation of its grievance procedure, dictate that an allegation of an abuse of dis-

cretion in applying "written agency rules, policies, or procedures" can serve as the basis for a 4th step grievance. There is no authority for the proposition that the Lottery's description of its grievance procedure can supersede the administrative rules promulgated by DER setting forth the scope of the non-contractual grievance procedure statewide. Here, the appellant has alleged that Mr. Fitzsimmons conduct was contrary to respondent's work rules and to its affirmative action plan. Therefore, the appellant has met the requirements of §ER 46.07(1)

Respondent also contends that Case No 92-0152-PC should be dismissed for lack of jurisdiction because the appellant has requested relief that is beyond the Commission's authority to grant. The Commission agrees that much of the relief listed in finding 3 is beyond its authority. However, as long as the Commission has the authority to hear the grievance at the 4th step, an aspect of the appellant's first request for relief ("That a thorough and impartial investigation of this incident be conducted by non-lottery personnel.") can be achieved, even though the Commission's role will not be that of an investigator

Finally, the respondent appears to contend that because the appellant has also filed a complaint of handicap discrimination and whistleblower retaliation (Case No 92-0182-PC-ER) arising from the same conduct as described in her grievances, those grievances should be dismissed. The language of §ER 46.03(2) indicates a clear intent to bar grievances where the subject matter of the grievance can be directly appealed to the Commission pursuant to §230 44(1). However, there is nothing in §ER 46.03(2) which indicates a similar intent to bar a grievance where the matter could also be the subject of a complaint of discrimination under the Fair Employment Act or of retaliation under the whistleblower law.¹

¹Contrary to appellant's argument made by letter dated July 27, 1992, the fact that her grievance alleges violation of the whistleblower law as well as the respondent's affirmative action plan and disability accommodation policy does not mean that the various limitations imposed by §ER 46.03 and 04 are somehow superseded.

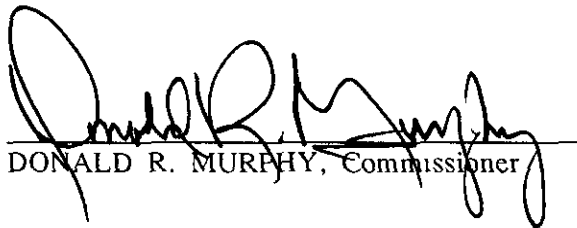
ORDER

Case No. 92-0166-PC is dismissed for lack of jurisdiction. Respondent's motion to dismiss Case No. 92-0152-PC is denied without prejudice. The Commission will convene a prehearing conference relating to Case No. 92-0152-PC and appellant's other cases pending before the Commission

Dated: January 27, 1993 STATE PERSONNEL COMMISSION


LAURIE R. MCCALLUM, Chairperson

KMS:kms
K:D:temp-10/92 Rentmeester


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner

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* The authority previously held by the Executive Director of the Wisconsin Lottery with respect to the position(s) that is the subject of this proceeding is now held by the Chairperson of the Wisconsin Gaming Commission.

NOTICE
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

Petition for Rehearing. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached

affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation