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CAROLYN LARSON,

Appellant,

v.

Secretary, DEPARTMENT OF
REVENUE,

Respondent.

Case No. 94-0114-PC

* * * * *

RULING ON
MOTION TO
DISMISS

This appeal is before the Commission on the respondent's motion to dismiss for lack of subject matter jurisdiction. The appellant filed this appeal as a fourth-step grievance under sec. 230.45(1)(c), Stats., contesting the respondent's decision to require her to pay it \$240.00 that she had received from an airline when she was bumped from a business-related commercial flight. The facts as stated in this ruling are drawn from the parties' briefs and appear to be undisputed; however, the statement of facts set forth below is made only for the purposes of deciding this motion.

FACTS

The appellant is an employee of the respondent. On Saturday, March 25, 1994, the appellant traveled by air from Madison to Denver, Colorado, at the request of the respondent. The airline bumped her from her scheduled connecting flight in Denver. As a result, she spent ten hours at the Denver airport that day waiting for a flight to take her to her destination. The airline gave the appellant a check in the amount of \$240.00 due to her inconvenience.

Because the appellant had flown on a Saturday, the respondent saved more than \$300.00 from what the fare would have been had she traveled the following Monday, which the appellant could have chosen to do.

The appellant disclosed to the respondent that she had received the check for \$240.00 from the airline. On April 6, 1994, Richard E. Grade, director

of the respondent's Bureau of Budget and Business Operations, directed the appellant to pay \$240.00 to the department, citing Section F, 3.01 of the 1993-95 State of Wisconsin Compensation Plan (Uniform Travel Schedule Amounts). The appellant paid the money to the department as directed.

On April 25, 1994, the appellant filed a third-step grievance regarding the respondent's decision. The respondent denied the grievance on May 18, 1994, citing Section F, 3.01 of the 1993-95 State of Wisconsin Compensation Plan (UTSA). On May 25, 1994, the complainant filed this appeal with the Commission. The appeal stated in relevant part:

The grievance was heard only at Step Three by agreement between Ms. Larson and the Department. The grounds for this appeal are that the denial of the grievance *was contrary to Department policy*, pursuant to Wis. Stats. 230.45(1)(c) and other applicable statutes. [Italics added].

DISCUSSION

This appeal presents a fourth-step grievance, in which the appellant contests the respondent's decision to require her to pay the respondent \$240.00 that she had received from an airline after she was bumped from an employment-related commercial flight. The respondent advances four arguments as to why the Commission lacks jurisdiction over this appeal. First, the respondent argues that this appeal would require the Commission to review the content of written agency rules and policies, which the Commission is not allowed to do under sec. ER 46.03(2)(i), Wis. Admin. Code. Second, the respondent argues that this appeal asks the Commission to address matters that are not a condition of employment, and therefore the Commission lacks jurisdiction under sec. 230.04(14), Stats. Third, the respondent argues that the appellant was required by the code of ethics, sec. ER-Pers 24.04(2)(b)(1.), Wis. Admin. Code, to pay the \$240.00 to the respondent. Finally, the respondent argues that, because the relevant policy was promulgated by the Department of Employment Relations and not the respondent, the respondent is not a proper party to this appeal.

Under sec. 230.45(1)(c), Stats., the Commission has jurisdiction to serve as the final step arbiter in the state employee grievance procedure established under sec. 230.04(14), Stats. That statute, in turn, provides that:

The secretary [of DER] shall establish, by rule, the scope and minimum requirements of a state employee grievance procedure *relating to conditions of employment.* [Italics added]

The grievance procedure mandated by sec. 230.04(14), Stats., is found in Chapter ER 46, Wis. Admin. Code. Under sec. ER 46.03(2)(i), Wis. Admin. Code, an employee may not use the grievance procedure to grieve "[t]he content of written agency rules and policies."

The respondent's decision to require the appellant to pay it \$240.00 was based on its interpretation and application of the Uniform Travel Schedule Amounts (UTSA), which is incorporated in the 1993-1995 compensation plan. A note in Section F, 3.01 of UTSA states as follows:

NOTE: Benefits from any airline promotion program such as free tickets for frequent fliers or credit vouchers for bumping belong to the State of Wisconsin and must be turned over to the agency fiscal officer.

The respondent has moved the Commission to dismiss this appeal for lack of subject matter jurisdiction. If, as asserted by the respondent, this appeal asked the Commission to review the content of written agency rules and policies (such as UTSA), the Commission would be required to dismiss it for lack of subject matter jurisdiction under sec. ER 46.03(2)(i), Wis. Admin. Code. However, the respondent's motion mischaracterizes the nature of the appeal. On its face, the appeal alleges that the respondent's decision to require the appellant to pay it \$240.00 "*was contrary to Department policy.*" In her brief, the appellant characterizes the appeal as challenging a misapplication of the UTSA policy.

The appellant's characterization of the appeal appears to be more accurate than the respondent's. Pleadings are to be treated as flexible and are to be liberally construed in administrative proceedings. Loomis v. Wisconsin Personnel Commission, 179 Wis. 2d 25, 30, 505 N.W.2d 462 (Ct. App. 1993). The appellant may be disputing that the \$240.00 paid to her was a "benefit" from an "airline promotion program" or that it is equivalent to a "credit voucher for

bumping." These questions were not addressed in the parties' briefs, and a hearing may be necessary to establish a factual record on which to decide them. The primary issue, however, appears to be whether the respondent abused its discretion in applying the UTSA policy to the factual situation presented by this appeal. Section ER 46.07(1), Wis. Admin. Code, permits a decision to be grieved to the Commission if the employee 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" In light of this provision, the Commission is of the opinion that it does have subject matter jurisdiction over this appeal.

The respondent presents three additional arguments as to why the Commission should dismiss this appeal. First, the respondent argues that the UTSA policy is not a condition of employment, and, therefore, the Commission is without jurisdiction under sec. 230.04(14), Stats. However, as noted above, this appeal does not contest the UTSA policy itself but, rather, the application of that policy to a set of facts. Given the fact situation presented by this appeal, and in light of sec. ER 46.07(1), Wis. Admin. Code, it appears that this appeal does concern a condition of employment. Second, the respondent argues that the appellant is required by the code of ethics, sec. ER-Pers 24.04(2)(b)(1.), Wis. Admin. Code, to pay the money to the respondent. However, that rule pertains to the acceptance of fees, honoraria, or reimbursement of expenses by an employee who presents papers, talks, demonstrations or makes appearances while acting as an official representative of the state. There is nothing in the appeal or the parties' briefs to indicate that this provision would apply to the fact situation presented in this appeal. Finally, the respondent asserts that, because the UTSA policy was promulgated by the Department of Employment Relations and not the respondent, the respondent is not a proper party to this appeal. Once again, it is noted that the appeal challenges the respondent's application of that policy to a given set of facts, not the policy itself.

Even if one analyzed the respondent's motion as being based not on lack of subject matter jurisdiction but rather on a failure to state a claim, it would have to be denied. Such a motion would require the Commission to analyze the

appeal's allegations liberally in favor of the appellant and to grant the motion only if it appeared with certainty that no relief could be granted. State v. American TV, 140 Wis. 2d 353, 357, 410 N.W.2d 596 (Ct. App. 1987). The appeal, on its face, is sufficient to put the respondent on notice that the appellant is challenging the respondent's application of a policy to a given set of facts. The respondent even acknowledges this at page 3 of its brief.

For the reasons stated above, the Commission issues the following


ORDER

The respondent's motion to dismiss is denied. The Commission will convene a prehearing conference to set a hearing date and discuss other procedural matters. The issue for hearing shall read substantially as follows (but may be modified as appropriate by the designated hearing examiner):

Whether the respondent abused its discretion when it applied the UTSA policy to require the appellant to pay it \$240.00 that she had received from a commercial airline when she was bumped from an employment-related flight in March 1994.

Dated: December 22, 1994 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

ACK:Rulings/Orders:Larson