

CHERYL L. KLEMMER,
Appellant,

v.

**Secretary, DEPARTMENT OF HEALTH
AND FAMILY SERVICES,**
Respondent.

**RULING
ON
MOTION
TO DISMISS**

Case No. 97-0034-PC

This matter is before the Commission on the respondent's motion to dismiss for lack of subject matter jurisdiction. The parties submitted written arguments.

On May 5, 1997, appellant filed an appeal with the Commission on a grievance report form. The form includes a box listing grievance steps 1, 2 and 3. Appellant circled step 1. The appeal identified the appellant as a Nursing Supervisor 1, and described the "grievance" as follows:

On 4-3-97 at 1300 grievant was summoned to Kathy Bellaire's office. Upon grievant's arrival, Ms. Bellaire issued grievant a "letter of consequence." At no time was grievant involved in any investigatory meetings to hear the facts, review the evidence, or refute the accusations that were outlined in this "letter." This action is classified as disciplinary action as outlined in Chapter 238, PPD Section, pg 9. This action further violated established policy & procedure as established in Chapters 264.1, A, 6; 264.2, A, 1; 264.2, B, 1; 264.1, A; & 264.1, D of the DHFS Supervisor Manual.

Appellant also attached a copy of the April 3rd letter to appellant which stated, in part:

The purpose of this letter is to place you on notice of potential discipline due to problematic behavior.

Your job performance regarding interactions with employees and completion of assigned tasks has been unsatisfactory for significant periods of time during the last 18 months. . . .

[P]rogressive discipline will be implemented in the future.

As a result of the above you are being placed on notice that any reoccurrence of the problematic behavior will result in the implementation of progressive discipline. Problematic behavior will include, but not be limited to the following [examples of behavior].

The Personnel Commission has the authority to hear appeals from certain disciplinary matters taken against employees outside of a collective bargaining unit. Pursuant to §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.

The April 3rd letter to appellant was not a “demotion, layoff, suspension, discharge or reduction in base pay.” The letter notified appellant of the *potential* for future discipline.

Appellant contends that the Commission “has jurisdiction over appeals from supervisory actions which constitute an ‘unreasonable and improper exercise of discretion or are for disciplinary purposes,’” citing *Basinas v. State*, 104 Wis. 2d 539, 551, 312 N.W.2d 483 (1981). The issue in *Basinas* was whether §230.44(1)(c), Stats., in combination with §PERS 30.10, Wis. Adm. Code (1975), provided the Commission with jurisdiction “over an appeal by a state of Wisconsin *career executive employee* from a *reassignment to a job in a lower pay range* when the appeal alleged that the reassignment was for ‘disciplinary purposes’ and constituted an ‘improper and unreasonable exercise’ of the appointing authority’s discretion.” 104 Wis.2d 539, 540 (emphasis added) The key to the *Basinas* decision was the specific language in §PERS 30.10(2), Wis. Adm. Code, which authorized a career executive employee to appeal a career executive reassignment if it was alleged that the reassignment constituted an unreasonable and improper exercise of an appointing authority’s discretion or was prohibited by §230.18, Stats. The holding in *Basinas* is inapplicable to the present facts because the appellant is not a career executive employe and she was not reassigned to a job in a lower pay range.

The Commission notes that, pursuant to §230.45(1)(c), Stats., it serves as the 4th and final step in the non-contractual grievance procedure for certain matters. See ch. ER 46, Wis. Adm. Code. Clearly, the present matter did not proceed through the first three steps of that procedure.


ORDER

This matter is dismissed for lack of subject matter jurisdiction.

Dated: July 2, 1997

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STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

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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 (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) 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.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.)

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