

GLEN A. JONES and PHILIP HUNTER,
Appellants,

v.

**Secretary, DEPARTMENT OF
TRANSPORTATION,**
Respondent.

**RULING ON MOTIONS
TO DISMISS**

Case Nos. 01-0001, 0002-PC

These appeals have been filed as fourth-step grievances. On February 16, 2001, respondent filed motions to dismiss these appeals for untimely filing and for lack of subject matter jurisdiction. The parties were permitted to brief the motions and the schedule for doing so was completed on March 30, 2001. The following findings of fact are based on information provided by the parties, appear to be undisputed, and are made solely for the purpose of deciding these motions.

FINDINGS OF FACT

1. On August 14, 2000, appellant Jones filed a grievance at the third step (grievance # 99-06-003-NC). This grievance stated as follows:

Evaluation methodology was flawed, contrary to DER Admin Rule ER 45 and TAM 410. Evaluation period began on June 13, 1999. Goal setting meeting was held on August 12, 1999. Written goals were distributed in late September, 1999. Ongoing informal performance discussions and periodic appraisals did not occur. Several goals had response dates in Oct. and Dec. 1999. No follow through by supervisor prior to May 23 evaluation meeting. Evaluation had significant discrepancies, omissions and factual errors. Grievant believes evaluation was not "conducted without discrimination and with equity." Lt. Patricia Hansen and Cpt. Robert Bereiter conferred on the evaluation, and Lt. Hansen stated, "The evaluation would not change as written."

This grievance related to an unfavorable performance evaluation which Jones had received in May of 2000. Jones was not awarded certain pay increases as the result of this unfavorable evaluation.

2. On August 14, 2000, appellant Jones filed a second grievance at the third step (grievance #99-06-004 NC). This grievance stated as follows:

Unequal treatment. Grievant is one of the two Inspector Field Sergeants in District 2. Grievant has provided notice to Lt. Hansen, noting significant discrepancies in scheduling, expectations and assignments compared to the other position incumbent. Lt. Hansen has stated that no double standard exists, and scheduling would continue at her discretion. Grievant also addressed concerns with Cpt. Robert Bereiter, without any changes or improvements. Lt. Hansen also noted grievant's attitude on May, 2000 evaluation. Grievant is a male, other incumbent is a female. Both employees have the same years of service, and both have completed basic supervisory development and advanced management training.

3. On August 14, 2000, appellant Hunter filed a grievance at the third step (grievance #99-06-001 NC). This grievance stated as follows:

Evaluation methodology was flawed, contrary to DER Admin Rule ER 45 and TAM 410. Evaluation period began May 1, 1999. Goal setting meeting was scheduled for August 12, 1999. Ongoing informal performance discussions and periodic appraisals did not occur. Evaluation has significant discrepancies and factual misstatements, indicating evaluation was not "conducted without discrimination and with equity." Unsatisfactory evaluation was presented to grievant on May 19, 2000.

This grievance related to an unfavorable performance evaluation which Hunter had received in May of 2000. Hunter was not awarded certain pay increases as the result of this unfavorable evaluation.

4. On August 14, 2000, Hunter filed a second grievance at the third step (grievance #99-06-002 NC). This grievance stated as follows:

Grievant is a 57 year old black male. Grievant believes Cpt. Robert Bereiter and Lt. Patricia Hansen have constructively created an environment to force the grievant to retire. That treatment includes, but is not limited to, scheduling and assignments that block the performance of required tasks, an evaluation containing significant factual errors and

omissions, with the intent to deny the employee any raise. The treatment further includes excluding the grievant from program planning, while holding the employee responsible for program performance.

5. The grievances described in Findings 1 through 4. were denied by respondent on November 22, 2000. These denials were hand-delivered to Jones and Hunter on November 30, 2000. Jones and Hunter filed their appeals of these denials with the Commission on January 2, 2001.

The Commission's authority to serve as final step arbiter in the state employee grievance procedure for non-represented employees derives from §230.45(1)(c), Stats. Section 230.04(14), Stats., provides that the Secretary of the Department of Employment Relations establish by rule the scope and minimum requirements of this grievance procedure. These rules are set forth in Ch. ER 46, Wis. Adm. Code, which states as follows, as relevant here:

ER 46.02 Definitions In this chapter . . .

(4) "Grievance" means a written complaint by an employee requesting relief in a matter which is of concern or dissatisfaction relating to conditions of employment and which is subject to the control of the employer and within the limitations of this chapter.

ER 46.03 Scope.

- (2) an employe may not use this chapter to grieve:
 - (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.

ER 46.04 Management rights. . .

- (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 employees of the agency.
 - (d) Hiring, promoting, transferring, assigning or retaining employees.

ER 46.07 Personnel Commission. (1) .. decisions involving the following personnel transactions may not be grieved to the commission:

- (a) A written reprimand;
- (b) A performance evaluation; or
- (c) The evaluation methodology used by an employer to determine a discretionary pay award, or the amount of the award.

(2) Grievances to the commission must be filed within 30 calendar days after service of a decision issued at the third step of the grievance procedure...

Respondent first argues that these appeals should be dismissed because they were untimely filed. It is undisputed that the denials of the subject grievances at the third step were hand-delivered to the appellants on November 30, 2000. Section ER 46.07(2), Wis. Adm. Code, requires that the appeal of these denials be filed with the Commission within 30 days. Section PC 1.02(10), Wis. Adm. Code, provides that filings with the Commission are effective upon receipt at the Commission's offices. The appeals by Jones and Hunter were received by the Commission on January 2, 2001. The 30th day following November 30, 2000, was December 30, 2000. However, December 30 was a Saturday, December 31 was a Sunday, and January 1, 2001, was a holiday, and the Commission's offices were closed on those days. As a result, appellants' filing on January 2, 2001, would be considered to have been made on the 30th day and would, as a result, have been timely filed.

The grievances under consideration here involve unsatisfactory performance evaluations, failure to obtain wage adjustments, the methodologies employed to perform the performance evaluations and to determine the wage adjustments, work schedules, and work assignments.

The Commission would be prevented from considering the performance evaluations pursuant to §ER 46.07(1)(b), Wis. Adm. Code; the methodologies employed to conduct the performance evaluations pursuant to §ER 46.07(1)(b), Wis. Adm. Code (*See, Holmblad v. DILHR*, 84-0091-PC, 8/31/84); the wage adjustments pursuant to §46.03(2)(k), Wis. Adm. Code (*See, Oestreich v. DOT*, 91-0014-PC, 4/5/91); the methodologies employed to determine the wage adjustments pursuant to

§ER 46.07(1)(c), Wis. Adm. Code; the work schedules pursuant to §§ER 46.03(2)(k), 46.03(2)(j), 46.04(2)(a) and (c), Wis. Adm. Code (*See, Henderson v. DHSS*, 85-0045-PC, 8/15/85; *Miller v. DOR*, 82-196-PC, 3/17/83; *Johnson v. DHSS*, 81-450-PC, 6/10/82); and the work assignments pursuant to §§ER 46.03(2)(j) and 46.04(2)(d), Wis. Adm. Code (*See, Rentmeester v. WGC*, 92-0152, 0166-PC, 1/27/93; *Miller v. DHSS*, 87-0209-PC, 2/8/89). It is concluded as a result that the Commission lacks jurisdiction over the subject matter of these grievances.

It should be noted that appellants' arguments relating to the motions under consideration in this ruling focus on the jurisdiction of the Commission under the Fair Employment Act (FEA), Subchapter II, Ch. 111, Stats. The fact that the matters addressed here are not actionable as fourth-step grievances does not affect the authority of the Commission to address them under the FEA. In fact, appellant Hunter has already filed a complaint under the FEA, and it is being processed by the Commission.

CONCLUSIONS OF LAW

1. These matters have been brought before the Commission pursuant to §230.45(1)(c), Stats.
2. Appellants have the burden to show that these appeals were timely filed.
3. Appellants have sustained this burden.
4. Appellants have the burden to show that the Commission has jurisdiction over these matters.
5. Appellants have failed to sustain this burden.

ORDER

Respondent's motions to dismiss are granted and these appeals are dismissed.

Dated: April 4, 2001

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

LRM:010001A+rul1


JUDY M. ROGERS, Commissioner

Parties:

Glen A. Jones
3700 Arbor Road
Waterford WI 53185-4630

Philip D. Hunter
2978 North 48th Street
Milwaukee WI 53210

Terrance D. Mulcahy
Secretary, DOT
P.O. Box 7910
Madison, WI 53707-7910

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.) 2/3/95