

STATE OF WISCONSIN

PERSONNEL COMMISSION

MICHAEL W. O'MEARA,
Appellant,

v.

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

**RULING
ON
MOTION TO
DISMISS**

Case No. 01-0014-PC

This matter was filed with the Personnel Commission at the 4th step of the non-contractual grievance procedure. Respondent has moved to dismiss the appeal for lack of subject matter jurisdiction and as untimely filed. The parties have filed written arguments. The following facts are undisputed.

FINDINGS OF FACT

1. At all times relevant to this proceeding, the appellant has been employed by respondent as a Civil Engineer Supervisor

2. The State's 1999-2001 Compensation Plan provides that employees whose job performances were rated below satisfactory as a result of performance evaluations conducted in the 12-month period ending July 1, 2000, are ineligible to receive General Wage Adjustments and Parity Adjustments for the fiscal year.

3. Respondent issued appellant an "unsatisfactory" performance evaluation no later than July 1, 2000, for the 12-month period ending July 1, 2000. This "unsatisfactory" rating was based on respondent's conclusion that appellant had not issued performance evaluations for some of his subordinates.

4. Appellant contends the respondent's conclusion was erroneous and that he had submitted all required performance evaluations on time.

5. Appellant was not aware that he had been given an unsatisfactory evaluation until after July 1, 2000.

6. Appellant then spoke to his supervisors and informed them he was suffering from one or more disabilities.

7 During July of 2000, but after July 1st, appellant's supervisors issued a second performance evaluation for appellant that rated his performance as "satisfactory." The supervisors informed appellant of the new evaluation. Appellant understood that he would not receive a pay increase in July, but understood he would receive subsequent increases during the year

8. Petitioner did not receive a pay increase in July or in October of 2000.

9. On or about October 24, 2000, appellant spoke to Michael Berg and learned he was not going to get *any* pay raises during the year.

10. Appellant filed a first-step grievance on October 26, 2000. It was returned on November 13, 2000, and signed by C. Rasmussen who stated it was "denied in accordance with the compensation plan."

11 Appellant filed a third-step grievance on December 11, 2000. It was returned on February 5, 2001. The third-step decision denied the grievance because appellant's "evaluation was unsatisfactory on July 1, 2000, and not changed to satisfactory prior to this date."

12. Appellant filed his fourth-step grievance with the Commission on February 22, 2001. The grievance stated, in part:

I am grieving the action of the department which has denied me all pay increases for this year. . .

I am asking that I be made whole by restoring all the raises which I would have received this year starting with the July raise.

CONCLUSIONS OF LAW

1. The appellant has the burden of establishing that the Personnel Commission has the authority to hear this matter under §230.45(1)(c), Stats.

2. The appellant has failed to sustain his burden.

3. The Commission lacks subject matter jurisdiction over this matter as a fourth-step grievance.

OPINION

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 s. 230.14(14) [230.04(14)]." According to §230.04(14), Stats., the Secretary of the Department of Employment Relations (DER) "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: .

(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.* (Emphasis added.)

Section ER 46.07, Wis. Adm. Code, provides:

(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 [personnel] commission only if it alleges that the employer abused its discretion in applying subch. II of ch. 230, Stats., or the rules of the administrator promulgated under that subchapter, subchs. I and II of ch. 230, Stats., or the rules of the secretary promulgated under those subchapters, or written agency rules, policies, or procedures, *except that 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. (Emphasis added.)

Appellant argues that his grievance does not relate to wages or the manner in which evaluations are conducted. According to appellant:

What this appeal seeks to accomplish is to make possible a reasonable accommodation, which my supervisors attempted grant to me, on account of stress and heart disease. (Letter brief dated April 6, 2001.)

If the appellant feels that respondent failed to reasonably accommodate appellant's disabilities, in violation of Wisconsin's Fair Employment Act, subch. III, ch. 111, Stats., he needs to file a complaint of discrimination with the Commission in order to invoke the Commission's authority under §230.45(1)(b), Stats. The Commission will provide the appellant with a complaint form, along with instructions for completing that form. He will be provided an opportunity to return the completed form to the Commission. *Saviano v. DP*, 79-PC-CS-335, 6/28/82.

In terms of appellant's fourth-step grievance, the question is whether the subject of the grievance is appropriately described as either wages or a performance evaluation, or whether the grievance fits within the scope of those "conditions of employment" that may be grieved to the Commission at the fourth-step of the non-contractual grievance procedure.

In *Loomis v. Wis. Pers. Comm.*, 179 Wis. 2d 25, 505 N.W.2d 462 (Ct. App., 1993), the Court of Appeals reviewed the Commission's authority under §230.45(1)(c), Stats:

We next turn to the merits of the case. The commission contends that it lacks jurisdiction under Wis. Adm. Code sec. ER 46.03(2)(k) to give *Loomis* a hearing on his grievance because the complaint involves issues related to wages and hours of work, which are precluded from the grievance process by the administrative rule. We disagree.

Pleadings are to be treated as flexible and are to be liberally construed in administrative proceedings. *Wisconsin Tel. Co. v. DILHR*, 68 Wis.2d 345, 359, 228 N.W.2d 649, 657 (1975). Applying this principle, we

conclude that Loomis' complaint invokes the commission's jurisdiction. The basis of Loomis' grievance deals with the fact that his job requires him to carry a pager and to remain on call outside of his regular working hours throughout the entire year. Loomis complained that he was not informed of this job requirement until two months after he was hired. This portion of his grievance clearly relates to a "condition of employment" which the commission expressly has jurisdiction to consider under Wis. Adm. Code sec. ER 46.03(1). By implication it also suggests that Loomis is grieving this matter in order to have the burdensome restriction lifted or altered.

However, we acknowledge that Loomis' grievance also alleges that others who have been given similar responsibilities receive additional compensation. The nature of this complaint is clearly related to wages, which Loomis expressly stated in his request for relief as follows:

It seems highly unethical and inequitable for a Maintenance Supervisor to receive less compensation than a classified staff. . .
I request that I be compensated for these added duties either in the form of standby pay or comp. time.

The commission clearly lacks jurisdiction to consider such a remedy under Wis. Adm. Code sec. ER 46.03(2)(k) because it relates to wages.

Therefore, when considering the grievance in its entirety, the exact nature of the relief sought by Loomis is uncertain. However, giving the grievance the liberal construction it is entitled, we are certain that it alleges matters relating to a condition of employment. 179 Wis. 2d 25, 30-31 (Footnotes omitted.)

In *Loomis*, the Court of Appeals focused on the underlying job requirement that the employee carry a pager and remain on call during his off-hours, rather than on the consequences of that requirement, relating to hours of work and pay.

In the present case, the comparable underlying events were the two performance evaluations issued to the appellant. Appellant argues that his first evaluation was premised on inaccurate information. Whether the Commission focuses on the evaluation or the resulting effect on appellant's rate of pay, both actions are expressly excluded from the scope of the Commission's authority under §230.45(1)(c), Stats., by §§ER 46.03(2)(k) and 46.07(1)(b), Wis. Adm. Code. Therefore, the Commission lacks the authority to process appellant's grievance.

ORDER

The appellant is provided 30 days from the date this ruling is signed in which to file a complaint of disability discrimination relating to his performance evaluation and rate of pay. The Commission will dismiss the present case once the 30 day period has run.

Dated: June 13, 2001 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

KMS:010014Arul1


JUDY M. ROGERS, Commissioner