

LYNN H. MILLER,
Complainant,

v.

**Secretary, DEPARTMENT OF
CORRECTIONS; Secretary,
DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER
PROTECTION,**
Respondents.

**RULING ON MOTIONS
TO DISMISS AND
FINAL ORDER**

Case No. 02-0055-PC

NATURE OF THE CASE

This case involves an appeal filed October 29, 2002, of DOC's termination of appellant's probationary employment, and certain related effects of that termination, i. e., the loss of appellant's right to restoration within DATCP, the loss of his right to reinstatement to state service, and the loss of his right to convert accumulated sick leave to pay for health insurance. The case is now before the commission on motions to dismiss filed by DATCP on December 6, 2002, and by DOC on January 6, 2003.¹ All parties have filed briefs or letter-briefs on these motions. The following findings of fact appear to be undisputed.

FINDINGS OF FACT

1. Prior to February 22, 2002, appellant was employed at DATCP in the classified civil service with permanent status in class as a Program and Planning Analyst 4. This position was in a bargaining unit represented by a union.
2. On February 22, 2002, appellant was laid off due to agency budget reductions.

¹ The commission regrets the delay in issuing this ruling. Due to the state's ongoing budget problems, the commission has been understaffed in professional positions by 20% since May 2000, 40% since February 2002, and 60% since January 2003.

3. DOC hired appellant as a Program Assistant 2 effective July 15, 2002. This was a classified civil service position in a bargaining unit represented by a union. Appellant was required to serve a six-month probationary period.

4. Via a letter dated August 26, 2002, DOC terminated appellant's probationary employment, effective August 23, 2002, for allegedly violating the department's fraternization policy.

5. DOC never informed complainant at this time or ever that he had any appeal rights or other forms of redress regarding his termination.²

6. Via a letter dated October 9, 2002, DATCP informed appellant that as a result of his "termination with cause" from the DOC, he had forfeited certain rights or benefits he would otherwise have had as a result of his prior service with DATCP. This was the first notice appellant had of the loss of the following rights or benefits:

- a) He lost his restoration rights with DATCP;
 - b) He lost his reinstatement rights within state service;
 - c) He lost his unused accumulated sick leave, and the concomitant opportunity to use that benefit to pay for health insurance;
 - d) He lost any state contribution for life insurance premiums;
 - e) He lost his income continuation coverage.
7. Complainant filed this appeal with this commission on October 29, 2002.

CONCLUSIONS OF LAW

1. The commission lacks subject matter jurisdiction over this appeal due to the absence of any statutory right of appeal with regard to any aspect of appellant's termination, because appellant did not have permanent status in class at the time his probationary employment was terminated by DOC.

2. The commission lacks competency to hear this appeal because it was not timely filed pursuant to s. 230.44(3), Stats.

OPINION

The commission lacks subject matter jurisdiction over this appeal. Within ss. 230.44 and 230.45, Stats., the only arguably relevant provision is s. 230.44(1)(c), which provides for appeals under the following circumstances:

Demotion, layoff, suspension or discharge. If an employee has permanent status in class [emphasis added] . . . the employee may appeal

² As discussed below, due to his status, appellant had no such rights.

a demotion, layoff, suspension, discharge or reduction in base pay to the commission.

Since appellant was on probation and did not have permanent status in class at DOC, he was not eligible to appeal his probationary termination. This principle was originally established by a 1981 court of appeals decision, *Board of Regents v. Wisconsin Personnel Commission*, 103 Wis. 2d 545, 309 N. W. 2d 366 (Ct. App. 1981), and the commission has consistently followed this precedent since then, *see, e. g., Wales v. DOC*, 98-0020-PC, 4/23/98 (employee serving permissive probation after transfer did not have right to appeal termination notwithstanding that she had attained permanent status in class in her previous position).

Even if the commission had jurisdiction over this appeal, it could not be heard because this appeal is also untimely. Section 230.44(3), Stats., provides that "Any appeal filed under this section may not be heard unless the appeal is filed within 30 days after the effective date of the action, or after the appellant is notified of the action, whichever is later." In this case, the effective date of the termination of appellant's probationary employment was August 23, 2002, and he received notice of the action on or about August 26, 2002. He did not file his appeal with this commission until October 29, 2002. This was 65 days after August 26th.³

Appellant argues that respondent DOC did not advise him of his appeal rights and he was not aware of any time limit until sometime after the date of his probationary termination. An agency has no legal obligation to inform an employee of his or her rights, *see Jabs v. State Board of Personnel*, 34 Wis. 2d 245, 148 N. W. 2d 853 (1967), and in any event, the appellant had no appeal rights and so it would have been pointless to have informed him of the time limits for an appeal.

The respondents also argue that even if appellant had appeal rights and had filed his appeal in a timely fashion, the commission's jurisdiction over the appeal would be superseded by the effect of s. 111.93(3), Stats., which provides:

[I]f a collective bargaining agreement exists between the employer and a labor organization representing employees in a collective bargaining unit, the provisions of that agreement shall supersede the provisions of civil service and other applicable statutes . . . related to wages, hours and

³ The technical term for the situation that exists where an appeal is not timely filed under s. 230.44(3), Stats., is that this commission lacks competency to hear the appeal. *See, e.g., Austin-Erickson v. DHFS & DER*, 97-0113-PC, 2/25/98.

conditions of employment regardless of whether or not the matters contained in those statutes . . . are set forth in the collective bargaining agreement.

The Commission declines to discuss the effect of this subsection due to the prior conclusions that the commission lacks subject matter jurisdiction over the appeal and lacks competency to hear the appeal due to the fact that the appeal was not timely filed.

With regard to the appellant's other arguments in opposition to these motions to dismiss, he argues that because he lost his reinstatement rights, accumulated sick leave, etc., as a result of his termination, he believes "[m]y appeal is directly related to their decision to discharge me. Therefore, I am appealing the Department of Corrections' decision to terminate my employment." (letter brief filed December 16, 2002, p. 2) The jurisdictional problem with this appeal is that appellant did not have permanent status in class as s. 230.44(1)(c), Stats., requires. The loss of salary and other benefits as a result of the termination constitute the damages appellant realized as a result of his termination; it does not provide any separate jurisdictional basis for an appeal.

Appellant also argues that he was not informed of the effect the termination would have on his accumulated sick leave and other benefits until he received an October 9, 2002, letter from the DATCP human relations manager detailing the loss of rights and benefits as a result of the termination. This does not affect the outcome of this case because the employer had no legal obligation to have informed appellant of the effects of his termination, and there is no legal reason why the 30 day time limit should be tolled. He also cites the timeliness provision in the contract, which calls for grievances to be filed within 30 days of the date "the grievant first became aware of, or should have become aware of with the exercise of reasonable diligence, the cause of such grievance." Appellant goes on to argue as follows:

By failing to appraise [sic] me of the consequences of being terminated DOC failed to *exercise reasonable diligence* in providing me with information I needed. Had I done so I would have grieved their decision through the union. Since they did not I request the Personnel Commission accept the timeliness of my appeal.

DOC, by failing to notify me of the consequences of their action relative to my reinstatement rights and sick leave, is guilty of an error or omission which would have allowed me to file a grievance in a timely fashion. Because they failed to properly inform me of the consequences of their decision to terminate my employment I am forced to seek remediation through the Personnel Commission instead of the established grievance procedures. (Appellant's letter-brief filed December 16, 2002, p. 3.

These arguments are not persuasive. First, the contract provisions regarding the time limit for filing a grievance are not applicable to the statutory time limit for filing an appeal with this commission.⁴ Second, neither respondent had a legal requirement to have informed appellant of the effects of the discharge for cause by the DOC. While appellant argues that DOC *omitted* this information (appellant's letter-brief filed January 14, 2003), the mere omission of information the employer has no requirement to provide does not provide a basis for tolling or somehow excusing the 30-day filing requirement of s. 230.44(3), Stats. *See, e. g., Jabs v. State Board of Personnel*, 34 Wis. 2d 245, 148 N. W. 2d 853 (1967)

The bottom line in this case is that appellant, as a probationary employee, was in a situation where he has no means of getting the DOC termination decision reviewed, at least administratively. As a probationary employee, he had neither access to the contractual grievance procedure, nor access to an appeal before this agency under the civil service law, regardless of when he filed his grievance or appeal. That the appeal was untimely under s. 230.44(3), Stats., is just an additional reason why this commission can not hear this appeal. Because the commission can not hear this appeal, it has no basis to address appellant's arguments that the termination decision was unfair.

The limited rights for probationary employees is a long-standing feature of employment relations in the state civil service, and in this country generally. In this state, it represents a legislative recognition of the employer's interests in being able to release employees who it decides will not be suitable for employment, and to do so at an early point in their employment with the

⁴ Also, the appellant is citing a provision from the contract addressing the *employee's* need to exercise due diligence and arguing that this requires the *employer* to exercise due diligence "in providing me with the information I needed," *id.*, which does not follow.

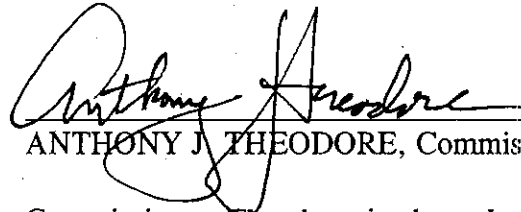
employer, with a minimum of difficulty. From the appellant's standpoint, this is of course unfortunate, particularly since because of his termination, he lost significant rights and benefits he had earned as a result of his employment with DATCP, and he does not have access to administrative review of the decision. However, any change in this type of situation will require a policy determination by the legislature.

ORDER

This appeal is dismissed for lack of subject matter jurisdiction and as untimely filed.

Dated: June 6, 2003.

STATE PERSONNEL COMMISSION


ANTHONY J. THEODORE, Commissioner

Commissioner Theodore is the sole sitting commissioner; the other two commissioner positions are vacant. Therefore, Commissioner Theodore is exercising the authority of the Commission. See 68 Op. Atty. Gen. 323 (1979).

Parties:

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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.)

IMPORTANT NOTICE: EFFECT OF 2003-2005 BUDGET BILL (Senate Bill 44)

The Governor has proposed, effective July 1, 2003, eliminating the Personnel Commission and distributing the Commission's authority between 1) the Wisconsin Employment Relations Commission (WERC) and 2) the Equal Rights Division (ERD) of the Department of Workforce Development. The legislation proposes that WERC assume jurisdiction over all

appeals (denominated by case numbers in the format of 00-0000-PC) and that ERD assume jurisdiction over all complaints (denominated by case numbers in the format of 00-0000-PC-ER). In the event this proposed legislation is signed into law, the rights of parties to petition for rehearing or judicial review will be modified to the extent that after the effective date of that legislation, the appropriate successor agency to the Personnel Commission would 1) receive any Petition for Rehearing, and 2) would be named in and would receive any Petition for Judicial Review.

5/21/2003