STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

GREGORY SCISSOM, Appellant
v.
Secretary, WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent

Case 107
No. 68910
PA(adv)-164

Decision No. 32832

Appearances:

Mark R. McCabe, Hale, Skemp, Hanson, Skemp & Sleik, P.O. Box 1927, La Crosse, WI 54602-1927, appearing on behalf of Gregory Scissom.

Andrea L. Olmanson, Assistant Legal Counsel, P. O. Box 7925, Madison, WI 53707-7925, appearing on behalf of the Department of Corrections.

ORDER GRANTING MOTION TO DISMISS

This matter, which arises from the decision to terminate Appellant's employment, is before the Wisconsin Employment Relations Commission (the Commission) on Respondent's motion to dismiss the appeal for lack of subject matter jurisdiction. The final submission of materials relating to the motion was on July 30, 2009.

The Findings set forth below appear to be undisputed. Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

FINDINGS OF FACT

1. On June 13, 2008, while employed in the State classified service as a Correctional Officer at the New Lisbon Correctional Institution, Appellant Gregory Scissom injured his back. As a consequence, he was removed from regular duty and began a leave of absence.

2. By letter dated April 15, 2009, Warden Ana M. Boatwright notified the Appellant that his employment "will be terminated effective immediately." According to the

letter, Appellant had failed to provide certain information or had otherwise failed to "cooperate." The letter provided, in part:

> As you have not provided the requested information, no further placement activities are possible to accommodate your condition. Because of this, the Department cannot assist you in finding alternative employment under our obligations under section 230.371 of the Wisconsin state statutes. . . .
>
> At [a meeting on March 10], reasons for your termination were discussed. You were also offered the opportunity to respond and you did not provide any new information to be considered. Based on this, we have concluded that termination for your failure to cooperate is appropriate.
>
> If you believe this action was not taken for just cause, you may appeal through the grievance procedure according to Article IV of the collective bargaining agreement.

3. Scissoms filed a letter of appeal with the Commission on May 14, 2009, alleging that this termination was without just cause and is therefore being appealed under Wis. Stats. 230.45(1)(a), 230.44(1)(c), and 230.44(1)(f). Mr. Scissom is seeking reinstatement of his employment and a finding that this termination was without just cause and in violation of the Collective Bargaining Agreement.

4. State civil service employees filling Correctional Officer positions are subject to a collective bargaining agreement between the State of Wisconsin and AFSCME Council 24, Wisconsin State Employees Union, AFL-CIO. Memorandum of Understanding No. 13 to the 2007-2009 agreement provides, in part:

> When the Employer determines an employee has a bona fide worker's compensation or s. 230.36 claim, and the employee can no longer perform the essential functions of his/her current position, the Employer, prior to medical termination, in accordance with s. 230.37(2), Wis. Stats., will make a good faith effort to do the following: transfer the employee to a position which requires less arduous duties; demote the employee; place the employee in a part-

[1] Subsection (2) of Sec. 230.37, Stats., provides, in part:

> When an employee becomes physically or mentally incapable of or unfit for the efficient and effective performance of the duties of his or her position by reason of infirmities due to age, disabilities, or otherwise, the appointing authority shall either transfer the employee to a position which requires less arduous duties . . . or as last resort, dismiss the employee from the service. . . .

> time position; or as a last resort, dismiss the employee. Prior to dismissal, the Employer will refer the employee to the State Injured Worker Re-employment Program . . . . The referral shall occur at least sixty (60) days prior to the effective date of the medical termination.
>
> When an employee is notified that medical termination is being considered, the local union president will be notified . . . .
>
> Prior to medically terminating the employee, the Employer will make a good faith effort to meet or teleconference with the employee to discuss the employee's options. . . .
>
> A grievance filed in response to a medical termination will be covered under 4/2/10 of this Agreement [which provides that "Arbitrations for discharge cases will be heard within one (1) year from the date of appeal to arbitration."]

5. Article IV, Section 11, Paragraph 1 of the bargaining agreement includes the following:

> The parties recognize the authority of the Employer to suspend, demote, discharge or take other appropriate corrective disciplinary action against employees for just cause. An employee who alleges that such action was not based on just cause may appeal a demotion, suspension or discharge taken by the Employer beginning with the Second Step of the grievance procedure. . . .

Based on the above and foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSIONS OF LAW

1. The Appellant has the burden of establishing that the Commission has subject matter jurisdiction over his appeal.

2. The Appellant has failed to sustain that burden.

3. The Commission lacks subject matter jurisdiction over this matter.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following

ORDER[2]

Respondent's motion is granted and this matter is dismissed for lack of subject matter jurisdiction.

Given under our hands and seal at the City of Madison, Wisconsin, this 17th day of August, 2009.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

[2] Upon issuance of this Order, the accompanying letter of transmittal will contain the names and addresses of the parties to this proceeding and notices to the parties concerning their rehearing and judicial review rights. The contents of that letter are hereby incorporated by reference as a part of this Order.

Department of Corrections (Scissom)

MEMORANDUM ACCOMPANYING ORDER GRANTING MOTION TO DISMISS

The Appellant seeks to obtain review of an action by the Respondent to terminate his employment as a Correctional Officer. His letter of appeal indicates that he is seeking to invoke the Commission's jurisdiction under Sec. 230.45(1)(a), Stats., and more specifically under Sec. 230.44(1)(c) or (f), Stats.

Paragraph (1)(f) provides that the following action is appealable to the Commission: "A determination that a person was discharged from the unclassified service for just cause under s. 230.337."[3] Appellant has not alleged that his position with Respondent was in the unclassified service. All the materials in the case file indicate that he had been employed in the *classified* service as a Correctional Officer. As a consequence, the Commission lacks jurisdiction over this matter under paragraph (1)(f).

The letter of appeal also refers to Sec. 230.44(1)(c), Stats. That paragraph provides, in part:

> If an employee has permanent status in class . . . the employee 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 scope of this paragraph is limited by language in Sec. 230.34(1):

> (a) An employee with permanent status in class . . . may be removed, suspended without pay, discharged, reduced in base pay or demoted only for just cause. . .
> (ar) Paragraphs (a) and (am) apply to all employees with permanent status in class in the classified service . . . except that for employees . . . in a collective bargaining unit for which a representative is recognized or certified, . . . if a collective bargaining agreement is in effect covering employees in the collective bargaining unit, the determination of just cause and all aspects of the appeal procedure shall be governed by the provisions of the collective bargaining agreement.

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[3] Section 230.337 reads, in part:

> If any incumbent member of the parole board in the office of the secretary of health and family services on January 1, 1990 in a classified position is not appointed to the parole commission created by 1989 Wisconsin Act 31 . . . the incumbent member shall have restoration rights. . . . The rights and privileges granted under this subsection are subject to the terms of any collective bargaining agreement that covers the incumbent parole board members.

Appellant has not alleged, nor is there any indication in the case file, that he was employed on January 1, 1990 in a classified position within the Department of Health and Social Services as a member of the Parole Board.

There is no dispute that prior to termination from his Correctional Officer position at the New Lisbon Correctional Institution, Appellant's position was within a collective bargaining unit that had a collective bargaining agreement in effect. We have already set forth in the Findings certain relevant provisions from the bargaining agreement which indicate a disciplinary action allegedly not based on just cause may be grieved beginning with the second step of the grievance procedure. A Memorandum of Understanding relating to the bargaining agreement indicates the contractual grievance procedure encompasses a grievance "filed in response to a medical termination."

The Appellant has failed to show that the subject of his appeal may be reviewed by the Commission pursuant to Sec. 230.44(1)(c), Stats., because the underlying personnel action, whether it is considered a medical termination or discipline,[4] must be grieved pursuant to the bargaining agreement. This result is also consistent with Sec. 111.93(3), Stats., which provides that the provisions of a collective bargaining agreement "shall supersede the provisions of civil service . . . related to wages, fringe benefits, hours and conditions of employment." The bargaining agreement language shows that the parties to the agreement have successfully bargained about the grievance procedure to be used to appeal disciplinary actions and medical terminations.[5]

The appeal must be dismissed.

Dated at Madison, Wisconsin, this 17th day of August, 2009.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commission

[4] Appellant, in his brief, states "this was never a medical termination."

[5] Both parties reference TADDEY V. DHSS, CASE NO. 86-0156-PC (PERS. COMM. 6/11/1987). That ruling distinguished mandatory and permissive subjects of bargaining and concluded that the subject of the appeal had not been bargained. Given the provisions of the agreement and memorandum of understanding in the present matter, the TADDEY ruling is inapposite.

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