

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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**TODD HAMILTON**, Appellant,

v.

**WISCONSIN DEPARTMENT OF CORRECTIONS**, Respondent.

Case 152  
No. 71708  
PA(adv)-231

**Decision No. 33923-A**

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**Appearances:**

**Todd Hamilton**, 301 Seminole Lane, Green Bay, Wisconsin 54313, appearing on his own behalf.

**Wilhelmina Mickelson**, Labor Relations Specialist – Chief, Office of State Employment Relations, 101 East Wilson Street, P.O. Box 7855, Madison, Wisconsin 53707-7855, appearing on behalf of the Department.

**EXAMINER’S ORDER DENYING MOTION TO DISMISS**

This matter is before the Wisconsin Employment Relations Commission on an appeal by Todd Hamilton, Psy. D., challenging a decision by the Department of Corrections on May 4, 2012 terminating his employment as a Psychologist-Licensed as a result of a suspension of his license. In his appeal, Hamilton contends that, rather than termination, the Department should have placed him in the position of Psychological Associate pending reinstatement of his license.

On September 27, 2012, the Department filed a Motion to Dismiss the appeal on the basis that the Department’s action, or inaction, in not transferring Hamilton to a Psychological Associate position is not appealable under sec. 230.44(1)(c), Stats., which governs appeals of discharge determinations.

No. 33923-A

Having reviewed the record and being advised in the premises, the Examiner hereby makes and issues the following

**FINDINGS OF FACT<sup>1</sup>**

1. The Appellant, Todd Hamilton, resides at 301 Seminole Lane, Green Bay, Wisconsin and was, prior to May 4, 2012, employed by the Wisconsin Department of Corrections as a Psychologist-Licensed.

2. One of the requirements for the position of Psychologist-Licensed is a valid license from the State of Wisconsin.

3. On April 25, 2012, Hamilton's Psychologist License was suspended by the Wisconsin Psychology Examining Board for a period of at least one year.

4. On May 4, 2012, the Department terminated Hamilton's employment.

5. On May 7, 2012, Hamilton filed a grievance of his termination with the Department.

6. On May 14, 2012, Employment Relations Specialist Brian Fusie issued a Step 2 determination denying the grievance on the basis that cause for termination had been established.

7. On May 28, 2012, Hamilton met with Fusie and explained that he did not challenge the underlying basis for the termination decision, but rather the failure of the Department to place him in the position of Psychological Associate pending reinstatement of his license.

8. The Department did not reverse its decision and the instant appeal was filed on August 8, 2012.

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<sup>1</sup>The foregoing Findings of Fact are based upon the pleadings in the file and are made solely for the purpose of disposing of the instant motion.

Based upon the foregoing Findings of Fact, the Examiner hereby makes the following

**CONCLUSIONS OF LAW**

1. The Appellant has the burden to establish that the Commission has subject matter jurisdiction over his appeal of his discharge.
2. The Appellant has met his burden.
3. Pursuant to sec. 230.44(1)(c), Stats., the Commission has subject matter jurisdiction over the appeal of the Appellant's discharge.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Examiner hereby makes and enters the following

**INTERLOCUTORY ORDER**

The Respondent's Motion to Dismiss is denied.

Dated at Fond du Lac, Wisconsin, this 30th day of January, 2013.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

John R. Emery /s/

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John R. Emery, Examiner

Wisconsin Department of Corrections (Hamilton)

MEMORANDUM ACCOMPANYING  
ORDER DENYING MOTION TO DISMISS

The Respondent, Department of Corrections (DOC) has moved to dismiss the appeal on the basis that the WERC does not have subject matter jurisdiction over the claim. Specifically, the DOC argues that the Appellant is challenging the failure of the Department to appoint him to a Psychological Associate position, in lieu of discharge, which is not a permissible appeal under sec. 230.44(1)(c), Stats., under which appeals of discharge decisions arise. In support of its position, the DOC asserts further that there is no legal requirement that the Department appoint the Appellant to another position under these circumstances and, to the contrary, the Department's management rights under Wis. Admin Code sec. ER 46.04, permit it to determine in its discretion the size and composition of its workforce and to manage hiring, promoting, transferring, assigning, or retaining employees.

The Appellant asserts that subject matter jurisdiction exists and that the appeal is properly before the Commission. He argues that, considering all the underlying facts and circumstances, the penalty of discharge was too severe and that the Department, therefore, did not meet the requirement of "just cause" for discharge under sec. 230.44, Stats. He further asserts that the DOC conceded this point in a letter sent to him on July 11, 2012, wherein he was informed that he could appeal the DOC's decision to the WERC if the appeal is based on an assertion that the discharge decision was not based on just cause.

Administrative agencies' subject matter jurisdiction over particular matters is conferred by statutes, which determine the nature of the matters an agency is authorized to hear. Stern v. Wisconsin Employment Relations Com'n, 2006 WI App 193, ¶ 24, 296 Wis. 2d 306, 324-325, 722 N.W.2d 594, 603. Where the existence of subject matter jurisdiction is challenged, it is the Appellant's burden to establish that jurisdiction exists. Village of Camp Douglas (Liddy), Dec. No. 32989 (WERC, 2/10), *citing* Wisconsin Department of Corrections (Garcia), Dec. No. 32890 (WERC 10/09).

Here, the Appellant, who was employed by the DOC as a Psychologist-Licensed, asserts that his license as a practicing Psychologist was suspended for one year by the Wisconsin Psychology Examining Board in April 2012, which made him unable to perform the duties of his position during that period. He disclosed this fact to his superiors and a decision was made to discharge him, which occurred in May 2012. He indicates that he is aware of another instance where a Psychologist-Licensed had his license suspended and the DOC, in fact, reassigned him as Psychological Associate during the period of his suspension, which is the action the Appellant argues the DOC should have taken here, in effect arguing that the penalty of discharge was inordinately harsh under the circumstances.

It has long been held in Wisconsin that determinations of just cause in personnel appeals of discharge decisions involve considering three underlying questions: 1) Whether the evidence supports a finding that the appellant committed the actions charged in the discharge letter; 2) whether the evidence shows that such conduct, if proved, is properly subject to discipline; and 3) whether the imposed discipline was excessive. Mitchell v. DNR, 83-0228-PC, 8/30/84. Here, assuming *arguendo*, that questions 1 and 2 may be answered in the affirmative, the question of whether the discharge decision was excessive under the circumstances remains. Moreover, it is the employer's burden to establish the existence of just cause. Bell v. Personnel Board, 259 Wis. 602, 49 N.W. 2d 889 (1951). Under the facts, as presented, therefore, I find that the Appellant has properly raised the issue of the degree of discipline as an element of just cause for his discharge and that the Commission has subject matter jurisdiction to determine the issue. The Respondent's Motion to Dismiss is denied.

Dated at Fond du Lac, Wisconsin, this 30th day of January, 2013.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

John R. Emery /s/

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John R. Emery, Examiner