

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ANDY BERG, Appellant,

vs.

WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case 205
No. 72058
PA(grp)-25

DECISION NO. 34105-A

Appearances:

Peggy A. Lautenschlager, Bauer & Bach LLC, 123 E. Main Street, Suite 300, Madison, Wisconsin, 53703-3360, appearing on behalf of Appellant Andy Berg.

Michael Soehner, Labor Relations Specialist – Chief, Wisconsin Office of State Employment Relations, 101 East Wilson Street, 4th Floor, P.O. Box 7855, Madison, Wisconsin 53707-7855, appearing on behalf of the Respondent Department of Corrections.

This matter is before us on the motion of Respondent to dismiss for lack of subject matter jurisdiction filed on June 26, 2013. The parties have fully briefed the matter and facts as alleged by Appellant are deemed admitted on a motion to dismiss. Accordingly, we issue the following

OPINION AND ORDER GRANTING MOTION TO DISMISS

Berg is employed as a Correctional Sergeant at the Department of Corrections facility in Union Grove, Wisconsin. He applied to participate in career-related training and to attend the University of Wisconsin-Parkside in pursuit of a business management degree. Berg requested that his work schedule be adjusted in order to facilitate his attendance at Parkside. The request was denied. The DOC's work rules provide that at its discretion employees may be granted time off without loss of pay or may be accommodated "through the use of alternative work patterns." DOC Policy 200.30.601, Employee Development and Training.

Berg grieved the adverse decision through Steps 1 and 2 pursuant to Chapter 430 of the Wisconsin Human Resources Handbook. He seeks review by the Commission. The DOC

counters with a motion to dismiss asserting the Commission lacks subject matter jurisdiction over the appeal.

Berg argues that under §§ 230.44(1)(a) or 230.44(1)(c), Stats., we have jurisdiction over his claim.

First of all, under § 230.44(1)(c), Stats., we have jurisdiction to review certain forms of disciplinary action imposed upon an employee with permanent status in class. They include an appeal of “a demotion, layoff, suspension, discharge or reduction in base pay” that is claimed to lack just cause. Here, there is no factual basis for concluding Berg was subjected to any of the enumerated forms of discipline.

Section 230.44(1)(a), Stats., provides for the “appeal of a personnel decision” made by the “administrator” or by one operating under a § 230.05(2), Stats., delegation. The reference to “administrator” is to the Administrator of the Division of Merit Recruitment and Selection (“DMRS”), and the scope of his authority is set forth in § 230.05, Stats. Decisions subject to review by the Commission under this subsection concern recruitment and certification. See gen. Galligan v. DOC and DMRS, WERC Dec. No. 32987 (2010).

Matters concerning general conditions of employment are the responsibility of the appointing authority (in this case DOC) not the administrator of DMRS. § 230.06(1)(b), Stats.

We have previously held that we lack subject matter jurisdiction over a dispute concerning hours of work for a DOC employee. *Gustavus v. DOC*, WERC Dec. No. 30817 (2004).

Berg also argues that Wis. Admin. Code § ER 46.07 provides a general power to the Commission to review personnel decisions for an abuse of discretion. That section must be read in conjunction with Wis. Admin. Code § ER 46.03 defining the scope of what is grievable. Subsection (k) of that provision specifically excludes matters related to “wages, hours of work and fringe benefits” from the definition of what is grievable. Regardless of the scope of our role as the final step arbiter under the state employee grievance procedure, clearly this dispute is not grievable in the first instance under that procedure and, accordingly, the Commission must dismiss this appeal.

ORDER

The Department of Corrections' motion to dismiss is granted.

Dated at the City of Madison, Wisconsin, this 29th day of April 2014.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman

Rodney G. Pasch, Commissioner