

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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ROBERT J. GENSKE, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0232

Case Type: PA

DECISION NO. 37316

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**Appearances:**

Kelly L. Temeyer and Scott S. Luzi, Attorneys, Walcheske & Luzi, LLC, 15850 West Bluemound Road, Suite 304, Brookfield, Wisconsin, appearing on behalf of Robert J. Genske.

Anfin Jaw, Attorney, Department of Administration, 201 East Wilson Street, 10th Floor, P.O. Box 7864, Madison, Wisconsin, appearing on behalf of the State of Wisconsin Department of Corrections.

**DECISION AND ORDER GRANTING MOTION TO DISMISS**

On January 25, 2018, Robert J. Genske filed a written request with the Wisconsin Employment Relations Commission (WERC) asking that WERC serve as the final step arbiter pursuant to § 230.45(1)(c), Stats. of a grievance he filed after the State of Wisconsin Department of Corrections (DOC) terminated his trial period as a Career Executive. On February 5, 2018, DOC filed a motion requesting that WERC dismiss the matter for lack of subject matter jurisdiction. Genske filed a response to the motion and the matter became ripe for action February 13, 2018.

Having considered the matter, the Commission concludes the motion to dismiss should be granted.

NOW, THEREFORE, it is:

**ORDERED**

The appeal of Robert J. Genske is dismissed.

Signed at the City of Madison, Wisconsin, this 23rd day of February, 2018.

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

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James J. Daley, Chairman

**MEMORANDUM ACCOMPANYING DECISION AND ORDER**  
**GRANTING MOTION TO DISMISS**

Section 230.24, Stats., authorizes creation of a Career Executive program.

Wisconsin Admin. Code § ER-MRS 30 establishes the terms of the Career Executive program and provides in pertinent part at Wis. Admin. Code § ER-MRS 30.06:

- (1) Upon initial appointment to the career executive program, a career executive employee, prior to attaining permanent status, shall serve a 2 year continuous service trial period. ...

Effective May 14, 2017, Genske was promoted into a Career Executive position subject to the two-year trial period. Effective November 11, 2017, his trial period was “terminated for failure to meet the expectations of the position” and he was “restored” to a former position. Because Genske did not have permanent status in class in the Career Executive position when the trial period was terminated, he did not have a § 230.44(1)(c) right to file a “just cause” appeal with the Commission. *See* § 230.44(1)(c), Stats. This matter presents the issue of whether Genske can nonetheless obtain Commission review of the same DOC action through use of the State employee grievance procedure.<sup>1</sup> The Commission concludes that he cannot.<sup>2</sup>

Section 230.45(1)(c), Stats., provides that the Wisconsin Employment Relations Commission shall:

- (c) Serve as final step arbiter in the state employee grievance procedure established under s. 230.04(14).

Section 230.04(14), Stats., states:

- (14) Except as provided in s. 230.445, the administrator shall establish, by rule, the scope and minimum requirements of a state employee grievance procedure relating to **conditions of employment** (emphasis added).

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<sup>1</sup> While Genske labels his grievance as a “Condition of Employment” matter, he seeks reinstatement and backpay, and alleges the process that preceded his loss of Career Executive status was flawed in various ways and was thus “without just cause.” It is the content of the grievance not the label that controls here and, therefore, it is apparent that Genske seeks the same substantive review of the DOC action as would have occurred had a § 230.44(1)(c) appeal been available to him.

<sup>2</sup> Wisconsin Admin Code § ER-MRS 30.10 is titled “Career executive employee redress rights” and primarily addresses the rights of those employees with permanent status. There is no reference to any right to use the state employee grievance procedure. The only portion thereof seemingly directly relevant to employees such as Genske who was serving a trial period is Wis. Admin Code § ER-MRS 30.10(5) which somewhat enigmatically states:

- (5) An employee in a career executive position serving a trial period shall have the same right of appeal under s. 230.44, Stats., as an employee who does not have permanent status in class in his or her present position.

On its face, it is by no means clear what “s. 230.44, Stats.,” rights are conveyed by the terms of § ER-MRS 30.10(5) but in any event Genske is proceeding under § 230.45 (1)(c), Stats.

Wisconsin Admin. Code § ER 46 is the State employee grievance procedure referenced in § 230.04(14), Stats. Consistent with § 230.04(14), Stats., Wis. Admin. Code § ER 46.02(4) defines a grievance as:

... a written complaint by an employee requesting relief in a matter which is of concern or dissatisfaction relating to conditions of employment and which is subject to the control of the employer and within the limitations of this chapter.

Wisconsin Admin. Code § ER 46.03(2) specifies that:

(1) An employee may not use this chapter to grieve:

...

(c) A demotion, suspension, discharge, **removal**, layoff or reduction in base pay (emphasis added);

...

In *Schigur v DOJ*, Dec. No. 32627 (WERC, 12/08), the Commission left open the question of whether the termination of a Career Executive trial period was a “removal” within the meaning of Wis. Admin. Code § ER 46.03(2)(c). *Id.*, at 12. The Commission now concludes that such a termination is a “removal” and thus is outside the scope of matters that can be grieved.

When reaching this conclusion, the Commission is persuaded that there is no reasonable likelihood that the “back door” of the grievance procedure is open when the “front door” of a § 230.44(1)(c), Stats., appeal is closed. Therefore, the scope of the Wis. Admin. Code § ER 46.03(2)(c) exclusion of matters that cannot be grieved is found to include the termination of the Career Executive trial period. As such an action does not fall within the scope of the State employee grievance procedure, it follows that it also falls outside the scope of our § 230.45(1)(c) jurisdiction to serve as the “final step arbiter.” Thus, Genske’s request that the Commission so serve has been dismissed.

Signed at the City of Madison, Wisconsin, this 23rd day of February, 2018.

## WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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James J. Daley, Chairman