

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

DELNITA LEWIS, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0370

Case Type: PA

DECISION NO. 38479

Appearances:

Delnita Lewis, 526 W. Burleigh Street, Milwaukee, Wisconsin, appearing on her own behalf.

Anfin Jaw, Wisconsin Department of Administration, 101 E. 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 May 28, 2020, Delnita Lewis filed an appeal with the Wisconsin Employment Relations Commission requesting that she be paid by her Employer, the State of Wisconsin Department of Corrections (DOC), for a two week period where she had self-quarantined and been away from work following contact with someone who had COVID 19. On June 9, 2020, DOC filed a motion to dismiss the appeal asserting that the Commission lacks subject matter jurisdiction to hear the appeal. On June 22, 2020, Lewis filed a response opposing the motion, whereupon the matter became ripe for Commission consideration.

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

NOW, THEREFORE, it is:

ORDERED

The motion to dismiss is granted, and the appeal is dismissed.

Issued at the City of Madison, Wisconsin, this 18th day of September, 2020.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman

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

In April of 2020 there was a case of COVID 19 at Lewis's place of employment, a DOC correctional center. Lewis came in contact with the person who had COVID 19. On April 17, 2020, Lewis requested Leave Without Pay (LWOP) based on "Exceptional Personal Reasons". DOC granted her request for LWOP. Lewis was subsequently away from work on unpaid leave from April 20 through May 3, 2020. After returning to work, Lewis requested approval to cover her two-week absence with federal emergency paid leave. Per that federal law, DOC's HR director asked Lewis to provide medical documentation that she was directed to self-quarantine by her health care provider. Lewis claimed that it was the CDC and the Milwaukee Public Health Department who recommended she self-quarantine. DOC decided that Lewis had not provided the required documentation, so it denied her request for federal emergency paid sick leave and/or emergency FMLA leave. Lewis disputes that finding; her appeal alleges that she was entitled to receive federal emergency paid leave after choosing to self-quarantine.

Although the appeal does not explicitly say so, we read it to ask the Commission to exercise its jurisdiction under Wis. Stat. § 230.45(1)(c) to act in this instance as the "final step arbiter" in the state employee grievance procedure. That section provides that the Commission shall "serve as final step arbiter in the state employee grievance procedure established under s. 230.04(14)" which provides that "the administrator [of the Division of Personnel Management] shall establish, by rule, the scope and minimum requirements of a state employee grievance procedure relating to conditions of employment." The administrative rules promulgated by the administrator, found in Wis. Admin. Code Ch. ER 46, establish limitations on the scope of the grievance procedure. Wisconsin Admin. Code § ER 46.03(1) provides "an employee may grieve issues which affect his or her conditions of employment" The phrase "conditions of employment" is not defined in this chapter. Wisconsin Admin. Code § ER 46.03(2) then goes on to identify 13 situations where the "employee may not use this chapter to grieve."

DOC contends that what Lewis is attempting to grieve here are "COVID 19 leave policies implemented by the employer." Building on that premise, DOC asserts that the grievance does not involve a "condition of employment" within the meaning of Wis. Admin. Code § ER 46.03(1). Notwithstanding that claim, it is assumed for the purpose of discussion that Lewis's grievance does raise a grievable issue.

When State employees raise grievable issues, they have to complete the two steps referenced in Wis. Admin. Code § ER 46.06(2) before they can appeal to the Commission. First, they must file a grievance with their agency. That is known as Step 1 and is referenced in Wis. Admin. Code § ER 46.06(2)(a). Second, if not resolved satisfactorily, they must appeal the Step 1 grievance finding to the Division of Personnel Management (DPM). That is known as Step 2 and is referenced in Wis. Admin. Code § ER 46.06(2)(b). After those two steps are completed, the employee can appeal to the Commission.

Here, Lewis complied with the first step. She filed a grievance with DOC on May 6, 2020. On May 18, 2020, DOC denied her grievance. DOC's response included instructions on the bottom of the Step 1 form concerning what the employee was supposed to do next if they were dissatisfied with the Employer's decision and wanted to appeal it. Specifically, it apprised the employee that they were to appeal to DPM for the second step of the grievance procedure. Lewis did not comply with this direction and did not appeal her first step grievance to DPM. Thus, she completely skipped the second step of the grievance procedure. What Lewis did instead was file an appeal directly with the Commission.

Lewis contends it was permissible for her to skip Step 2 in this instance and appeal directly to the Commission because DOC had taken the position in their Step 1 response that her grievance was "non-grievable."

Since Lewis impermissibly skipped Step 2 of the state employee grievance procedure before she appealed to the Commission, the question before us is whether the Commission can address the merits of the grievance. Wisconsin Admin. Code § ER 46.07(1) provides "if the grievant is dissatisfied with the decision received from the administrator or designee at the second step under s. ER 46.06 (2) (b) 2., the decision may be grieved to the commission" It is implicit from this provision that what is appealed to the Commission is a Step 2 grievance response, not a Step 1 grievance response. In this case, there was no Step 2 grievance response because Lewis skipped that step. In so finding, it is noted that what we have done here is consistent with what we do in state employee disciplinary appeal cases where the employee impermissibly skips a step of the grievance procedure. See, *Berglund v. DHS*, Dec. No. 37956 (7/2019).

Given that finding, the Commission need not address DOC's remaining argument that the Commission lacks jurisdiction under Wis. Stat. § 230.45(1) to hear Lewis's appeal.

The appeal has therefore been dismissed.

Issued at the City of Madison, Wisconsin, this 18th day of September, 2020.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman