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 DAVID WING,  
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 Appellant,  
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 v.  
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 President, UNIVERSITY OF WISCONSIN,  
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 Respondent.  
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 Case No. 80-256-PC  
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DECISION  
AND  
ORDER

**OFFICIAL**

NATURE OF THE CASE

This matter is before the Commission on respondent's objection to subject matter jurisdiction.

DECISION

The appellant filed an appeal of a non-contractual grievance. The respondent has objected to the Commission's jurisdiction to hear this appeal. The respondent argues that the subject matter of this appeal concerns a discretionary performance award and that pursuant to §§230.12(5)(e), 230.44(1)(e) and 230.45(2), Wis. Stats., such matters cannot be appealed to the Commission. Respondent further argues that pursuant to §230.45(1)(c), Stats., the Commission can only hear appeals of non-contractual grievances relating to "conditions of employment," and that the subject matter of this appeal does not relate to "conditions of employment" but rather relates to "wages."

In his written arguments, the appellant makes a number of contentions which are essentially substantive in nature -- e.g., that the secretary of DER has not developed a uniform employe performance evaluation program as required by law.

As to the arguments which are material to the question of subject matter jurisdiction, the appellant points out that his grievance was concerned as well with an exceptional performance award (EPA), and that §§230.12(5)(e), 230.44(1)(e), and 230.45(2) do not prohibit appeals of EPA's. This is correct, but this still leaves the question of whether the subject matter involves "conditions of employment," as required by §230.45(1)(c), Wis. Stats.

In DHSS v. Personnel Commission (Hovel), No. 79-CV-5630 (Dane County Circuit Court, 1/29/81), the court reversed a Commission decision holding that DHSS had erred in failing to establish the appellant's starting salary above the minimum rate. The Commission had heard this case under §230.45(1)(c), Stats., as an appeal of a non-contractual grievance.

The court held that the Commission lacked jurisdiction because the question of Mr. Hovel's starting salary had to do with "wages" and therefore did not relate to "conditions of employment," pointing out that:

"...the terms 'wages,' 'hours' and 'conditions of employment' have come to be considered as distinct 'terms of art' in the field of labor management relations. See, cf., §§111.33, 111.06(1)(c), 111.91(1), Stats. The instant statute, however, employs only the broad language 'conditions of employment,' with no clarifying language."

Exceptional performance awards are included in the section of the civil service code entitled "Compensation," see §230.12, §230.12(7), Stats., and relate to "wages." On the basis of the foregoing court decision, it follows that this subject is not included in the term "conditions of employment," and the Commission lacks jurisdiction under §230.45(1)(c), Wis. Stats.

To the extent that appellant's concerns run to the performance evaluation and not to the performance awards as such, an appeal to the Commission under §230.45(1)(c), Wis. Stats., is still prohibited. Section 230.45(2), provides:

"Subsection (1)(c) does not apply to an employe who, using the agency grievance procedure, grieves his or her dissatisfaction with the evaluation methodology and results used to determine any discretionary performance award or the amount of such an award. Any such employe grievance shall be settled on the basis of the appointing authority's decision." (emphasis added)

This makes it clear that the employe's dissatisfaction with a performance evaluation cannot be appealed. It is immaterial that such a performance evaluation also may have other functions, such as relating to an EPA determination.

The appellant also argues that the Commission has jurisdiction pursuant to §230.45(1)(b), Stats. This provides that the Commission shall "receive and process complaints of discrimination under §111.33(2)." Such complaints of discrimination are limited to allegations of discrimination because of "age, race, color, handicap, sex, creed, national origin, ancestry, arrest records or conviction record," see §111.32(5)(a), Stats. The appellant's grievance did not make any such allegation, nor has any been suggested in his written arguments on jurisdiction. There is no basis for jurisdiction under §230.45(1)(b), Stats.

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ORDER

This appeal is dismissed for lack of subject matter jurisdiction.

Dated April 1, 1981

STATE PERSONNEL COMMISSION

  
Charlotte M. Higbee  
Chairperson

  
Gordon H. Brehm  
Commissioner

Commissioner Murphy did not participate in the consideration or decision of this matter due to his prior employment as counsel to the respondent with respect to other matters involving this appellant.

AJT:mek

Parties:

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