

STATE OF WISCONSIN

PERSONNEL COMMISSION

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 JAMES GUZNICZAK, \*  
 ROBERT BROWN \*  
 \*  
 Appellants, \*  
 \*  
 v. \*  
 \*  
 Secretary, DEPARTMENT OF \*  
 HEALTH AND SOCIAL SERVICES, \*  
 and Secretary, DEPARTMENT \*  
 OF EMPLOYMENT RELATIONS, \*  
 \*  
 Respondents. \*  
 \*  
 Case Nos. 83-0210, 0211-PC \*  
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FINAL  
 DECISION  
 AND  
 ORDER

This matter is before the Commission on respondent, Department of Health and Social Services' (DHSS) motion to dismiss for lack of subject matter jurisdiction. Both parties have submitted briefs. Neither party has requested an evidentiary hearing, and the facts necessary to decide this case, as found in the parties' briefs, appear to be undisputed.

FINDINGS OF FACT

1. On May 13, 1987, the Commission issued a decision and order ordering the respondents to reallocate the appellants to Correctional Officer 3 effective the beginning of the first pay period after December 15, 1980, instead of on June 12, 1983. This part of its decision and order was in response to the first issue of the appeal for hearing: "What is the proper effective date for the reallocation of the appellants' positions?"

2. The Commission also noted on its decision and order dated May 13, 1987, in the decision portion, beginning at the bottom of page 10 as follows:

The respondents state in their brief as follows:

The respondents concede that if the Commission determines that the reallocations herein should have occurred at an earlier date, that, if the provision of the apposite compensation plans and collective bargaining agreements so provide, the appellants would be entitled to an hourly wage rate adjustment and back pay computed thereon.

The Commission assumes that this effectively resolves the second issue set forth above, and that the appellants will be paid, on a retroactive basis, the difference in pay between what they were paid and what they would have been paid had the reallocation of their t[w]o positions been effective....

This part of the decision was in response to the second issue of the appeal which was part of the aforesaid hearing as follows:

2. Whether, if retroactive reallocation is granted, the appellants are entitled to a retroactive award of base-pay and/or overtime pay.
3. The respondents filed a petition for rehearing on May 21, 1987.

The petition was granted, and the May 13, 1987 decision and order was reaffirmed in its entirety on June 11, 1987.

4. The appellants were reallocated effective December 28, 1980. The date of the reallocation notice was July 2, 1987.

5. Checks for back pay and the reallocation notices were sent to the appellants (and their attorney) by letter dated September 3, 1987.

6. By letter dated September 28, 1987, the appellants filed the current appeal which stated, in part, as follows: "we appeal DH&SS's/DER's payroll calculations in response to the Commission's Order, which resulted in underpayment on back pay and incorrect final hourly rates."

7. On October 29, 1987, at a prehearing conference held before Dennis P. McGilligan, Chairperson, respondent DHSS filed a motion to dismiss based on lack of subject matter jurisdiction.

8. The parties completed their briefing schedule on the matter on January 8, 1988.

CONCLUSION OF LAW

The Commission lacks subject matter jurisdiction over this case.

DECISION

The appellants argue that the Commission has the authority to enforce its orders under sec. 230.44(4)(c), Stats., which provides:

(c) After conducting a hearing on an appeal under this section, the commission shall either affirm, modify or reject the action which is the subject of the appeal. If the commission rejects or modifies the action, the commission may issue an enforceable order to remand the matter to the person taking the action for action in accordance with the decision. Any action brought against the person who is subject to the order for failure to comply with the order shall be brought and served within 60 days after the date of service of the commission's decision. (emphasis supplied)

It is true that the above section states that the Commission may issue an "enforceable" order. However, said section does not state that the Commission does the enforcing. To the contrary, the above section has been interpreted to mean that the Commission cannot enforce its own orders. In Wisconsin Department of Employment Relations v. Wisconsin Personnel Commission, Case No. 85 CV 3022 (Dane County, 12-27-87), the court held:

The various provisions of sec. 230.45, Wis. Stats., which enumerate the powers and duties of (the Commission), however, limit (the Commission's) power to only "hear appeals." That section does not empower (the Commission) to enforce anything, particularly not contracts in a different case. Thus, enforcement actions referred to in sec. 230.44(4)(c) are to be brought only in circuit court. Where there is ". . . any reasonable doubt of the existence of an implied power of an administrative body (it) should be resolved against the exercise of such authority." State ex rel. Farrell v. Schubert, 52 Wis. 2d 351, 358, 190 N.W. 2d 529, (1971). This compels a single conclusion; [the Commission] lacks legal authority to enforce the Kabat settlement agreement.

Appellants feel the above cases can be distinguished from the instant dispute. The Commission, however, does not agree. Appellants argue that the court's decision in the cited Dane County case was ambiguous in its opinion as evidenced by the following qualifying statement:

The various provisions of Sec. 230.45, Wis. Stats., which enumerate the powers and duties of WPC, however, limit WPC's power to only 'hear appeals.' That section does not empower WPC to enforce anything, particularly not contracts entered in a different case.

Appellants feel that because the Court did not stop at "anything" and added the qualifying phrase "particularly not contracts entered in a different case" that it left open the issue of whether the Commission can enforce its own orders.

The Commission does not read the above provision in the same wide open manner as appellants. The court was clearly endorsing the viewpoint, consistently expressed by the Commission in the past and discussed in detail by the hearing examiner in the Proposed Decision and Order, which was ultimately appealed to the Dane County Court as noted above, that the Commission does not have the authority to "enforce" its own orders. The court clearly stated that "enforcement actions referred to in sec. 230.44(4)(c) are to be brought only in circuit court." (emphasis added) The hearing examiner, when the dispute was before him, Klepinger v. DER, Case No. 83-0197-PC, discussed the Commission's inability to enforce its orders in the Proposed Decision and Order as follows:

Regardless of who seeks to enforce the settlement agreement, the Commission lacks the jurisdiction to consider such a request.  
Pursuant to §230.44(4)(c), Stats.:

After conducting a hearing on an appeal under this section, the commission shall either affirm, modify or reject the action which is the subject of the appeal. If the commission rejects or modifies the action, the commission may issue an enforceable order to remand the matter to the person taking the action for action in accordance with the decision. Any action brought against the person who is subject to the order for failure to comply with the order shall be brought and served within 60 days after the date of service and the commission's decisions.

No other provisions in ch. 230, Stats., discuss the mechanism for enforcing an order of the Commission. The reference in §230.44(4)(c), Stats., to bringing an action for failure to comply with the Commission's order relates to the title of ch. 801, Stats., "Civil Procedure - Commencement of Action and Venue." This reference suggests that

enforcement actions are to be filed in circuit court. In contrast, the Commission may hear appeals and complaints as provided in §230.45, Stats.<sup>FN</sup>

A second indication that the Commission lacks jurisdiction over enforcement actions is that the Commission has no authority to impose fines or other penalties against noncomplying parties. Here the Commission already ordered the dismissal of the Kabat appeal 'pursuant to the settlement agreement entered into by the parties.' Enforcement proceedings would be meaningless if there was no punishment available.

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<sup>FN</sup> In Elder v. DHSS, 79-PC-ER-89 (3/19/82), the Commission considered complainant's motion to vacate a year-old order dismissing the case pursuant to a stipulation between the parties. The Commission held that it lacked the authority to reopen, citing State ex rel. Farrell v. Schubert, 52 Wis. 2d 351 (1971), and noted that there was at least a reasonable doubt as to the existence of such authority. In addition, the complainant had the option of seeking enforcement of the stipulation pursuant to §111.36(3)(d), Stats., of the Fair Employment Act. That enforcement mechanism does not exist for appeals, such as the present case, that are filed under §230.44(1), Stats.

The above section of the Klepinger case was rejected in the Final Decision and Order by the Commission in the case but for different reasons<sup>1</sup> and it is cited here to reiterate the Commission's opinion (and rationale) that it does not have the authority to enforce its order for appeals.

Appellants further argue that "because the Commission has the authority to issue enforceable orders, it then must have the authority to enforce those orders" citing the Revised Model State Administrative Procedures Act (RMSAPA) in support thereof. However, the appellants have not introduced any evidence (and the Commission cannot find any) that RMSAPA is the law in Wisconsin. The Commission is bound by the provisions

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<sup>1</sup> In Klepinger, the Commission characterized its action as being something other than enforcement. The Circuit Court disagreed with this characterization and reversed.

in chs. 227 and 230 in cases such as are before it now. Neither chapter grants it the authority to enforce its own orders in appeal cases. Section 230.44(4)(c), Stats., clearly provides for the manner of enforcement, that is, a civil action in court. Therefore, the Commission rejects this argument by appellants.

Appellants contend in the alternative that if this matter is not cognizable as an enforcement action, it can be heard as an appeal under §230.44(1)(b), Stats., which authorizes the Commission to hear appeals:

"...of a personnel decision under s.230.09(2)(a) or (d)...by the secretary or by an appointing authority under authority delegated by the secretary...."

Section 230.09(2)(a), Stats.<sup>2</sup>, states, as pertinent, as follows:

"The secretary may reclassify or reallocate positions...."

It appears to be undisputed that what occurred in this case is that following the Commission's decision and order of May 13, 1987, which established the effective date for reallocation of appellants' positions as the beginning of the first pay period after December 15, 1980, the respondents reallocated appellants' positions accordingly, i.e., with an effective date of December 28, 1980. What appellants object to, and the subject matter of these appeals, is not the effective date, but the payroll calculations used to arrive at the back pay award. The authority to make this salary calculation is not that of the secretary under §230.09(2)(a), Stats., which has to do with the decision to reclassify or reallocate a position. Rather, this authority is vested by statute in the appointing

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<sup>2</sup> Section 230.09(2)(d), Stats., concerns the matter of regrade vs. competition and is not material to this case.

authority, here DHSS. Section 230.06(1)(b), Stats., provides that one of the powers and duties of an appointing authority is to "fix their [employees'] compensation." Such action to fix an employe's compensation is not an exercise of delegated authority from the secretary of DER pursuant to §230.04(1)(m), Stats., and is not appealable pursuant to §230.44(1)(b), Stats. Furthermore, such an action is not appealable under any other provision in §§230.44 or 230.45, Stats.


ORDER

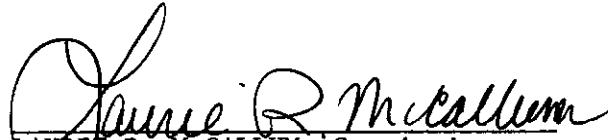
Respondent's motion to dismiss for lack of subject matter jurisdiction is granted and these appeals are dismissed.

Dated: April 6, 1988 STATE PERSONNEL COMMISSION

  
DENNIS P. MCGILLIGAN, Chairperson

DPM/AJT:rcr  
RCR03/2

  
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LAURIE R. MCCALLUM, Commissioner

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