

DALE OESTREICH,

Appellant,

v.

Secretary, DEPARTMENT OF  
TRANSPORTATION,

Respondent.

Case No. 91-0014-PC

DECISION  
AND  
ORDER

This matter is before the Commission on the respondent's motion to dismiss for lack of subject matter jurisdiction. The parties have filed briefs and the following facts appear to be undisputed.

#### FINDINGS OF FACT

1. The appellant was employed as a Civil Engineer-3 in the Department of Transportation, Transportation District 5, for a number of years prior to June 4, 1990. As such, he was a represented employe of the State Engineering Association and was covered by the terms and provisions of the applicable collective bargaining agreement.

2. The collective bargaining agreement established wages, hours and conditions of employment, including a pay adjustment that was tied to the implementation of new pay ranges as part of a classification survey.

3. The appellant was promoted to a non-represented supervisory position on June 4, 1990.

4. Employees who were in represented positions throughout the period from April 8, 1990 through June 17, 1990, received retroactive lump sum pay adjustments for hours worked during that period.

5. The appellant was only granted a retroactive lump sum pay adjustment for the portion of that period in which he was serving in an unrepresented position, i.e. from June 4, 1990 through June 17, 1990. The appellant did not receive any retroactive pay adjustment for the hours he worked from April 8th through June 3rd.

6. The appellant filed both contractual and non-contractual grievances with the respondent regarding the pay adjustment action. The third step non-contractual grievance identified three other individual grievants and sought:

Payment, retroactive to the effective date (April 8, 1990), that resulted from changes to the salary structure from the Survey as well as the stratification adjustments was not received.

7. The third step decision was rendered on January 25, 1991, and read as follows:

The grievance is denied. The grievants were not represented by SEA on June 17, 1990 and as such are not eligible for the lump sum payment as provided for in the SEA contract provisions.

8. On January 28, 1991, the appellant filed a fourth step grievance with the Commission. In his letter, the appellant stated that other employes "fell into the same situation" and listed the names of three other persons. However, the appellant was the only person who signed the fourth step grievance.

#### CONCLUSION OF LAW

The Commission lacks jurisdiction over this matter.

#### OPINION

The appellant seeks to grieve the decision denying his request for a lump sum wage adjustment arising from his employment by the respondent in a represented position.

The Commission's jurisdiction over non-contractual grievances is based on §230.45(1)(c), Stats., which provides that the Commission shall: "Serve as final step arbiter in the state employe grievance procedure established under s. 230.14(14) [230.04(14)]." According to §230.04(14), Stats., the Secretary of the Department of Employment Relations "shall establish, by rule, the scope and minimum requirements of a state employe grievance procedure relating to conditions of employment."

The Secretary of DER has established the scope of the grievance procedure in §ER 46.03, Wis. Adm. Code:

(1) Under this chapter, an employe may grieve issues which affect his or her conditions of employment, including any matter on which the employe alleges that coercion or retaliation has been practiced against the employe except as provided in sub. (2).

(2) An employe may not use this chapter to grieve:

\* \* \*

(k) Any matter related to wages, hours of work, and fringe benefits.

The subject of the grievance is whether the appellant is entitled to retroactive payment, i.e. a wage adjustment, arising from the hours he worked as a represented engineer from April 8th through June 3rd. This subject clearly relates to the appellant's wages for this period. As such, the grievance is outside the scope of the non-represented grievance procedure established by the Secretary of DER.


The Commission need not address the parties' arguments relating to whether the topic of appellant's grievance was "subject to the control" of DOT, thereby falling within the definition of "grievance" found in §ER 46.02(4), Wis. Adm. Code.

The appellant has also argued that dismissal of this matter could "effectively eliminate any forum for review where, as here, the agency also denies the union grievance on the grounds that the employe is no longer a member of the union." It is undisputed that the appellant's contractual grievance has been taken to arbitration. Whatever the arguments raised in that proceeding and whatever the result, the contractual grievance cannot confer jurisdiction of the dispute on the Commission where jurisdiction does not already exist by statute and administrative rule.

ORDER

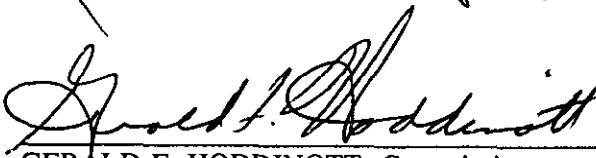
This matter is dismissed for lack of jurisdiction.

Dated: April 5, 1991 STATE PERSONNEL COMMISSION

  
LAURIE R. MCCALLUM, Chairperson

KMS:kms

  
DONALD R. MURPHY, Commissioner

  
GERALD F. HODDINOTT, Commissioner

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