



3. Appellant's predecessor in this Maintenance Supervisor 1 position was assigned responsibility for carrying a pager 24 hours a day. This pager is connected to the county office which receives the signal when the Johnson Control equipment alarm on the campus goes off. During the recruitment for this Maintenance Supervisor 1 position, the incumbent of the subordinate Maintenance Mechanic 2 position, Eddie Junk, was assigned temporary responsibility for carrying the pager. During August of 1989, appellant was advised by his supervisor that he would now be responsible for carrying the pager; that the radius of the pager was approximately 60 miles; and that if he was going to be outside that radius, he should notify the county so that other arrangements could be made by the county for responding to the alarm. Appellant asked if, when he received notice via the pager that the alarm had gone off, he could call Mr. Junk and have him respond to the alarm. Appellant's supervisor indicated that would be acceptable but that it remained appellant's responsibility to carry the pager. Appellant was not required to carry the pager during times when he was on leave or when he notified his supervisor or the county that he would be outside the pager's radius.

4. The Maintenance Mechanic 2 position was eligible for standby pay when he carried the pager. Appellant's supervisory position was not eligible for such standby pay for carrying the pager. Appellant was eligible for and did receive pay for the time he actually spent on campus outside his scheduled hours responding to the alarm. Appellant became aware of this compensation distinction relating to standby pay in December of 1991 when the Maintenance Mechanic 2 received standby pay for carrying the pager while appellant was on leave.

5. Appellant filed this grievance during January of 1992. Appellant's primary motivation in filing the grievance was to dispute his ineligibility for standby pay. At hearing, appellant indicated that the relief he was seeking was freedom from carrying the pager or the earning of compensatory time for the time he was required to carry the pager outside his scheduled hours.

6. Between July of 1989 and January of 1992, appellant came to campus four (4) times outside his regularly scheduled hours to respond to the alarm. During this same period of time, appellant was paged on the pager an average of four (4) times a month.

Conclusions of Law

1. Respondent, as the moving party, has the burden to show that the issue before the Commission should be dismissed based on mootness or untimely filing.
2. Respondent has sustained this burden as to mootness but not as to timeliness.
3. Appellant has the burden to show that the assignment to his position of responsibility for carrying the pager is an abuse of discretion.
4. Appellant has failed to sustain this burden.

Opinion

Motion to Dismiss

On November 8, 1995, respondent filed a motion to dismiss based on mootness and untimely filing. Attached to the motion was a copy of a letter apparently signed by appellant on October 13, 1995, in which appellant gives respondent notice that he was resigning from the subject Maintenance Supervisor 1 position effective October 27, 1995. Although appellant has had an opportunity to respond to this motion and to this attachment to the motion, he has not done so and the Commission will assume, for purposes of deciding the motion, that appellant was not employed by respondent after October 27, 1995.

In Parrish v. UW-M, Case No. 84-0163-PC (12/6/84), the Commission stated as follows in relying upon State ex rel. Ellenburg v. Gagnon, 76 Wis. 2d 532, 251 N.W. 2d 773 (1977) and in distinguishing Watkins v. ILHR Department, 69 Wis. 2d 782, 233 N.W. 2d 360 (1975):

In the present case, the appellant is no longer employed by respondent UW-Milwaukee. Any ruling by the Commission at the fourth step of the grievance procedure could not affect the appellant's current or past working conditions. Unless the appellant was to be reemployed by the respondent some time in the future, the circumstances that generated the appeal could not recur. These facts are readily distinguishable from those in Watkins (supra), where the complainant was still employed by the same employer, still represented by the same union and in a position to be affected by future transfer decisions. In State ex

re. Ellenburg, (supra), the mere possibility that Mr. Ellenburg would again be incarcerated and again be disciplined for violating the false communication rule was apparently not enough for the Court to change its conclusion. For the same reason, the instant case meets the definition of mootness.

The circumstances here are parallel to those in Parrish and the conclusion that the issue is moot equally applicable. As a consequence, the Commission grants respondent's motion to dismiss on the basis that the case is moot.

This conclusion obviates the necessity of deciding whether the grievance was timely filed. However, if it had been concluded that the case was not moot, the motion to dismiss would not have been granted based on the timeliness argument. It appears as though the subject matter of this grievance, i.e., the carrying of the pager or the failure to be compensated for the carrying of the pager, could be considered a continuing violation which continued up until the date of the filing of the grievance at the first step in January of 1992. As a result, the filing of the grievance in January of 1992 would not be considered untimely.

### Grievance

The Court of Appeals stated as follows in Loomis v. Wis. Pers. Comm., 179 Wis. 2d 25, 505 N.W. 2d 462 (1993):

Pleadings are to be treated as flexible and are to be liberally construed in administrative proceedings. *Wisconsin Tel. Co. v. DILHR*, 68 Wis. 2d 345, 359, 228 N.W. 2d 649, 657 (1975). Applying this principle, we conclude that Loomis' complaint invokes the commission's jurisdiction. The basis of Loomis' grievance deals with the fact that his job requires him to carry a pager and to remain on call outside of his regular working hours throughout the entire year. Loomis complained that he was not informed of this job requirement until two months after he was hired. This portion of his grievance clearly relates to a "condition of employment" which the commission expressly has jurisdiction to consider under Wis. Adm. Code sec. ER 46.03(1). By implication it also suggests that Loomis is grieving this matter in order to have the burdensome restriction lifted or altered.

However, we acknowledge that Loomis' grievance also alleges that others who have been given similar responsibilities receive additional compensation. The nature of this complaint is clearly related to wages, which Loomis expressly stated in his request for relief . . . The commission clearly lacks jurisdiction to consider such a remedy under Wis. Adm. Code sec. ER 46.03(2)(k) because it relates to wages.

Therefore, when considering the grievance in its entirety, the exact nature of the relief sought by Loomis is uncertain. However, giving the grievance the liberal construction it is entitled, we are certain that it alleges matters relating to a condition of employment. While the commission does not have jurisdiction to consider claims for relief involving wages, the commission does have jurisdiction to consider claims for relief involving conditions of employment, such as the job requirement complained of by Loomis in this case.

Therefore, we conclude that the commission's dismissal of Loomis' complaint for lack of subject matter jurisdiction at this early stage of the proceeding was premature. Accordingly, the commission must hold a hearing on Loomis' grievance to determine the nature of the relief being sought by Loomis, whether it can grant him such relief, and, if so, whether such relief is warranted given the evidence presented at the hearing.

At hearing, appellant identified the requested relief as freedom from carrying the pager or the earning of compensatory time for the time he was required to carry the pager outside his scheduled hours.

Compensatory time is time earned by performing work responsibilities outside regular work hours which can be used as leave time at a later date. The earning of compensatory time relates to compensation (wages) and hours and, as a result, is excluded from the commission's authority to hear grievances at the fourth step by operation of §ER 46.03(2)(k), Wis. Adm. Code, which provides that an employe may not grieve "[a]ny matter related to wages, hours of work, and fringe benefits."

The Court of Appeals stated, in relation to appellant's assignment to carry a pager, that ". . . the commission does have jurisdiction to consider claims for relief involving conditions of employment, such as the job requirement complained of by Loomis in this case." The Commission does not interpret this language or other language in the decision as a conclusion by the Court of Appeals that the Commission does have jurisdiction to decide a grievance relating to the job requirement that appellant carry a pager. Rather, the Commission interprets this language as a conclusion by the Court of Appeals that this aspect of the grievance relates to a job requirement, that a job requirement such as this is a condition of employment, and that the Commission has jurisdiction to decide grievances relating to certain conditions of employment.

Carrying the pager is one of appellant's assigned work responsibilities. Section ER 46.03(2)(j), Wis. Adm. Code, provides that an employe may not grieve a "condition of employment which is a right of the employer as defined in s.ER 46.04." Section ER 46.04(2), states as follows, in pertinent part:

(2) For purposes of this chapter, the management rights of the employer include, but are not limited to, the following:

(a) Utilizing the personnel, methods and means to carry out the statutory mandate and goals of the agency.

\* \* \* \* \*

(c) Managing and directing the employes of the agency.

\* \* \* \* \*

In Miller v. DHSS, Case No. 87-0029-PC (2/8/89), the Commission concluded as follows:

Appellant has also appealed the assignment of duties to and the removal of duties from her position. Such allocation of duties among the positions of an agency are considered a management prerogative within the meaning of §ER 46.04, Wis. Adm. Code, i.e., within the scope of management rights to utilize personnel to carry out the statutory mandate and goals of the agency (§ER 46.04(2)(a), Wis. Adm. Code) and to manage and direct the employees of the agency (§ER 46.04(2)(c), Wis. Adm. Code). The Commission does not, therefore, have jurisdiction to hear and decide this aspect of the appeal pursuant to §23.045(1)(c), Stats.

This reasoning is equally applicable here and the Commission concludes that it does not have subject matter jurisdiction over this appeal.

If the decision of the Court of Appeals is that the Commission does have jurisdiction over a grievance relating to the appellant's assigned responsibility to carry the pager, the question would then become one of determining whether appellant has shown that respondent "abused its discretion in applying Subch. II, Ch. 230, Stats., or the rules of the administrator promulgated under that subchapter, subchs. I and II, ch. 230, Stats., or the rules of the secretary promulgated under those subchapters, or written agency rules, policies, or procedures, . . ." within the meaning of §ER 46.07 (1), Wis. Adm. Code. Appellant has failed to specify the statute, administrative rule, agency rule, policy or procedure that respondent is

alleged to have mis-applied, or to specify how respondent is alleged to have abused its discretion in assigning appellant responsibility to carry the pager. An abuse of discretion has been defined as "a decision exercised to an end or purpose not justified by and clearly against reason and evidence." Lundeen v. DOA, Case No. 79-0208-PC (6/3/81); Jorgenson v. DOT, Case No. 90-0298-PC (5/12/91). The evidence in the record does not show that respondent abused its discretion in assigning appellant to carry and respond to the pager. The possibility of appellant being called by the county outside of his regularly scheduled work hours was discussed at his employment interview; appellant's predecessor in the position was assigned the responsibility of carrying the pager; responsibility for maintaining the Johnson Control system and coordinating maintenance of the system with the county maintenance supervisor were specifically listed in appellant's position description; appellant was paged very infrequently and returned to campus in response to a page only four (4) times between July of 1989 and January of 1992; appellant's position was the only supervisory position in the physical plant or maintenance unit on campus so there was no other supervisory position to handle this responsibility; when appellant was going to be outside the radius of the pager, he could notify the county and they would handle the call; and, when he was on leave or outside the radius of the pager, he could give the pager to the Maintenance Mechanic 2. In addition, §230.35(5)(a), Stats., gives a state agency the authority to require that an employee work additional hours beyond the 40 hour per week standard; and the compensation plan for non-represented state employees recognizes the concepts of standby and call-back/call-in (State of Wisconsin Compensation Plan, 1991-93, Section A, 4.07 and 4.08). The evidence before the Commission clearly does not show that respondent's assignment to appellant of responsibility for carrying and responding to the pager was unreasonable.

Order


This appeal is dismissed.

Dated: February 15, 1996

STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

LRM:lrn

  
DONALD R. MURPHY, Commissioner

  
JUDY M. ROGERS, Commissioner

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NOTICE  
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW  
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

**Petition for Rehearing.** Any person aggrieved by a final order (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

**Petition for Judicial Review.** Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's



decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.)

2/3/95