

STATE OF WISCONSIN

PERSONNEL COMMISSION

MICHAEL T. MURPHY,
Appellant,

v.

**Secretary, DEPARTMENT OF
CORRECTIONS,**
Respondent.

**RULING
ON
MOTION TO
DISMISS**

Case No. 02-0006-PC

This matter is before the Commission at the fourth step in the non-contractual grievance process. The respondent raised a jurisdictional objection. The parties were provided an opportunity to file briefs. The underlying facts do not appear to be in dispute.

FINDINGS OF FACT

1. At all times relevant to this proceeding, the appellant has been employed by respondent as a Supervising Officer 2 (Captain) at the Drug Abuse Correctional Center (DACC) in Winnebago, Wisconsin. DACC is part of the Wisconsin Correctional Center System (WCCS) operated by respondent.

2. The practice in the WCCS was to pay Captains straight time for up to 90 hours per two-week pay period.

3. For the 20th pay period in 2001, appellant's supervisor, Denis Sutton, signed appellant's timesheet for 102.50 hours, or 12.5 hours in excess of 90 hours. Respondent initially paid appellant for the 102.50 hours.

4. For the 21st pay period in 2001, appellant's supervisor signed appellant's timesheet for 97 hours, or 7 hours in excess of 90 hours. Respondent initially paid appellant for the 97 hours.

5. On October 29, 2001, respondent's payroll clerk completed a form to adjust appellant's gross salary for the 20th and 21st pay periods to reflect a reduction of 19.5 hours.

6. On November 15, 2001, appellant received his paycheck with his pay reduced by 19.5 hours.

7 Also on November 15th, as a consequence of the reduction in pay, appellant filed a non-contractual grievance. The grievance was denied.

8. On November 29, 2001, the appellant filed a third step non-contractual grievance with respondent that included the following language:

This grievance is being filed within the guidelines set forth in the Supervisors Manual Chapter 308 Standard Hours of Work and Overtime Addendum I, section A, Subsection (C) Paragraph 1(c) as it relates to this grievant's loss of 19.5 hours of additional hours of pay. This grievant was required to be On-Call for pay periods 20/01 and 21/01 at which time grievant in a 19½ period received 14 phone calls at his residence as it relates to a medical emergency, the transportation of an inmate, the assignment of officers for this emergency, the required approval of overtime and the care and custody of the inmates at DACC. This grievant also reported to DACC to insure that all work assignments for correctional officers were met, the care and custody of inmates and approved work assignments for correctional officers were met, the care and custody of inmates and approved visitors safety were met as mandated by this grievant's supervisors and the Administrator of WCCS.

In his grievance, the appellant sought the following relief:

This grievant is aware that their counterparts within WCCS and other Department of Corrections facilities are paid for their hours beyond the approved 90 hours at their hourly rate and it is the grievant's wish that the following occur.

- A. That grievant's 19.5 hours of pay be restored.
- B. Supervising Officers I and II's be treated the same.
- C. That grievant be awarded all documented back pay that exceeded the 90 hours authorized.
- D. That all payroll for WCCS and the Division of Adult Institutions be reviewed for accuracy as it is related to grievants claim as to hours paid to Supervising Officer 1's and Supervising Officer II's as alleged by grievant.

- E. That all Payroll Adjustments be approved and signed by the Appointing Authority not the WCCS Payroll Clerk.
- F. That the WCCS Warden be mandated to pay all Supervising Officer II's and Supervising Officer I's if applicable for hours worked beyond the approved 90 hours as is done in all DOC Institutions.

9. By memorandum dated November 27, 2001, the WCCS Warden, Mickey Thompson, established various rules, effective immediately, relating to "Captain Hours and Pay."

Actual hours [for captains] worked beyond 85 must be approved *in advance* by the Center Superintendent on a case by case basis to meet specific center operational needs. Captains will be paid (regular pay) for approved hours up to 90 per pay period. They will earn compensatory time for hours worked in excess of 90.

Hours beyond 90 may be approved for *exceptional circumstances only* and must be justified by the Center Superintendent by attaching a written justification to the signed timesheet.

On-call status does not qualify as hours worked. Captains will earn additional hours or compensatory time when actual hours are worked during the on-call period. (Emphasis in original.)

CONCLUSIONS OF LAW

1. The appellant has the burden to show that the Commission has subject matter jurisdiction over this non-contractual grievance.
2. The appellant has failed to sustain his burden.
3. The Commission lacks jurisdiction over this matter.

OPINION

The question raised by the respondent's motion is whether the Commission has the authority to review the subject matter of the appellant's 4th step non-contractual grievance.

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 employee grievance procedure established under s. 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 employee 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 employee may grieve issues which affect his or her conditions of employment, including any matter on which the employee alleges that coercion or retaliation has been practiced against the employee except as provided in sub. (2).

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

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

The issue raised by appellant’s grievance is whether he should be paid at his regular salary for the 19.5 hours in which he was allegedly on call during two pay periods in 2001. While appellant characterizes this as an issue of equal treatment relative to captains at other institutions, the issue is still one of wages. As such, it is a non-grievable subject pursuant to the specific language of §46.03(2)(k), Wis. Adm. Code.

The Commission reached a similar result in *Bornick v. DOC*, 91-0084-PC, 4/1/92, when it dismissed, for lack of subject matter jurisdiction, a grievance challenging the failure of respondent to provide him premium pay for overtime hours he worked supervising certain training.¹ This result is also supported by the decision rendered by the Court of Appeals in *Loomis v. Wis. Pers. Comm.*, 179 Wis. 2d 25, 505 N.W.2d 462 (Ct. App., 1993), where the Court reviewed the Commission’s authority under §230.45(1)(c), Stats:

We next turn to the merits of the case. The commission contends that it lacks jurisdiction under Wis. Adm. Code sec. ER 46.03(2)(k) to give Loomis a hearing on his grievance because the complaint involves issues related to wages and hours of work, which are precluded from the grievance process by the administrative rule. We disagree.

¹ Also, the Commission has dismissed 4th step grievances for lack of subject matter jurisdiction where they relate to rate of pay, *O’Meara v. DOT*, 01-0014-PC, 6/13/2001, wage adjustments, *Jones & Hunter v. DOT*, 01-0001, 0002-PC, 4/4/2001, and a failure to receive parity adjustment, *Wagener v. DOC*, 00-0161-PC, 11/15/2000.

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 as follows:

It seems highly unethical and inequitable for a Maintenance Supervisor to receive less compensation than a classified staff. .
I request that I be compensated for these added duties either in the form of standby pay or comp. time.

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. 179 Wis. 2d 25, 30-31 (Footnotes omitted.)

In *Loomis*, the Court of Appeals focused on the underlying job requirement that the employee carry a pager and remain on call during his off-hours, rather than on the consequences of that requirement, relating to hours of work and pay.² In the present case,

² On remand, *Loomis v. UW*, 92-0035-PC, 2/15/96, the Commission concluded that the grievance was moot, but in *dicta*, stated that it lacked the authority to hear a fourth step grievance to the extent that appellant identified his requested relief as earning compensatory time for the time he was required to carry a pager outside his scheduled hours, because the relief related to compensation (wages) and hours and fell within the exclusion found in §ER 46.03(2)(k), Wis. Adm. Code.

the appellant has focused entirely on the pay consequence of the on call requirement, i.e. he is seeking payment for the 19.5 hours in question during 2001. Appellant is not contesting respondent's requirement that he be on call for certain periods of time. He is contesting the fact that he was not paid for the hours he was on call during the 20th and 21st pay periods of 2001. Under these circumstances, the Commission lacks subject matter jurisdiction over the matter.

ORDER

This matter is dismissed for lack of subject matter jurisdiction.

Dated: April 17, 2002 STATE PERSONNEL COMMISSION


ANTHONY J. THEODORE, Commissioner

KMS:020006Arull


KELLI S. THOMPSON, Commissioner

Parties:

Capt. Michael T Murphy	Jon Litscher
PO Box 36	Secretary, DOC
Winnebago, WI 54985	P.O. Box 7925
	Madison, WI 53707-7925

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