

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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**BARRY J. STERN, Appellant,**

v.

**Secretary, DEPARTMENT OF WORKFORCE DEVELOPMENT, Respondent.**

Case 3  
No. 63312  
PA(adv)-33

**Decision No. 30912**

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**Appearances:**

**Barry Stern**, Attorney at Law, 4116 Euclid Avenue, Madison, Wisconsin 53711, appearing on his own behalf.

**Howard Bernstein**, Legal Counsel, Department of Workforce Development, P.O. Box 7946, Madison, Wisconsin 53707-7946, appearing on behalf of the Department of Workforce Development.

**ORDER GRANTING MOTION TO DISMISS FOR LACK OF JURISDICTION**

This matter is before the Commission on Respondent's motion to dismiss for lack of subject matter jurisdiction. The parties have submitted written arguments, the last of which was received April 2, 2004.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

**FINDINGS OF FACT**

1. By letter dated May 22, 2002, the Respondent appointed the Appellant to an Attorney position in its Unemployment Insurance Division. Appellant was required to serve a twelve-month probationary period.

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2. By letter dated November 8, 2002, the Respondent appointed the Appellant to an Attorney position in its Worker's Compensation division, effective December 2, 2002. Appellant was required to serve a new twelve-month probationary period.

3. Appellant's position was within the "Legal Related Broadbanded bargaining unit" represented by the Wisconsin State Attorneys Association.

4. In a memo dated October 24, 2003, Respondent informed Appellant that it was extending his probation by 200 hours "due to your absences during your probationary period" and "[i]n accordance with ss. ER-MRS 13.05(2) of the Wisconsin Administrative Code."

5. In a letter dated December 30, 2003, Respondent informed Appellant that it was terminating his "probationary employment" effective the close of business on December 30<sup>th</sup>.

6. Appellant and William Gansner, President of the Wisconsin State Attorneys Association, filed a third-step contractual grievance relating to Appellant's "improper discharge." The grievance cited Article 4, Section 9 of the applicable labor agreement. Respondent refused to accept the grievance, stating it related to a "non-grievable issue."

7. On January 30, 2004, Appellant filed an "appeal of discharge" with the Commission. Appellant alleged the discharge was without just cause.

8. The parties disagree whether the Appellant had attained permanent status in class at the time his employment was terminated.

Based on the above and foregoing Findings of Fact, the Commission makes and issues the following

### CONCLUSIONS OF LAW

1. The Appellant has the burden of establishing subject matter jurisdiction.
2. The Appellant has failed to sustain his burden and the Commission lacks subject matter jurisdiction over this matter as an appeal filed under Secs. 230.44(1) or 230.45, Stats.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following

**ORDER**

This matter is dismissed for lack of subject matter jurisdiction.

Given under our hands and seal at the City of Madison, Wisconsin, this 1st day of June, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

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Judith Neumann, Chair

Paul Gordon /s/

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Paul Gordon, Commissioner

Susan J. M. Bauman /s/

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Susan J. M. Bauman, Commissioner

Department of Workforce Development (Stern)

MEMORANDUM ACCOMPANYING ORDER

Certain employees of the State of Wisconsin may obtain review by the Commission of various disciplinary actions as provided in Sec. 230.44(1)(c), Stats.:

If an employee has permanent status in class . . . the employee may appeal a demotion, layoff, suspension, discharge or reduction in base pay to the commission, if the appeal alleges that the decision was not based on just cause.

However, the Commission lacks subject matter jurisdiction over appeals of termination decisions where the employee is serving an initial probationary period because the employee lacks the “permanent status in class” that is required under Sec. 230.44(1)(c), Stats. *BOARD OF REGENTS V. WISCONSIN PERSONNEL COMMISSION*, 103 WIS.2D 545, (CT. APP., 1981). Therefore, in the event the Appellant’s employment with Respondent was terminated while he was still in probationary status, the Commission would lack the authority to hear his appeal.

Appellant contends that he gained permanent status in class *before* Respondent issued its December 30, 2003 letter. Even if the Respondent conceded this point, which it does not, the Commission would still lack jurisdiction over his appeal because of the effect of Secs. 111.93(3) and 230.34(1)(ar), Stats. The former subsection provides that the terms of a collective bargaining agreement “shall supersede the provisions of civil service and other applicable statutes . . . related to wages, fringe benefits, hours and conditions of employment.” Section 230.34(1)(ar), Stats., reads:

[F]or employees specified in s. 111.81(7)(a) in a collective bargaining unit for which a representative is recognized or certified . . . the determination of just cause and all aspects of the appeal procedure shall be governed by the provisions of the collective bargaining agreement.

Appellant concedes that his Attorney position was within a collective bargaining unit and covered by a contract. He sought to invoke the contractual grievance procedure that is established by the bargaining agreement but his efforts in that regard have proven unsuccessful. Yet whatever may have occurred with respect to Appellant’s contractual grievance, the processing of the grievance fails to serve as a jurisdictional basis for the

Commission to review the underlying transaction under Sec. 230.44(1)(c), Stats. WOLFE V. UW, 85-0049-PC, 9/26/85 (The Commission's predecessor agency for processing State civil service appeals, the Personnel Commission, lacked the authority to hear an appeal of an alleged constructive discharge where the employee's position was part of a bargaining unit, even though the employer had returned the employee's contractual grievance at the third step stating that because the employee had resigned he was no longer an employee and could not utilize the contractual grievance procedure.)

Given all of the foregoing, it is apparent that the Commission lacks subject matter jurisdiction to review Respondent's decision to terminate Appellant's employment. If he had obtained permanent status in class, his appeal to the Commission would be barred by Secs. 111.93(3) and 230.34(1)(ar), Stats. If he had not, he would lack a prerequisite for invoking Sec. 230.44(1)(c), Stats. DEPARTMENT OF CORRECTIONS (GOINS), DEC. NO. 30766 (WERC, 1/04).

As part of his written argument in this matter, the Appellant contends that Respondent acted improperly when it established a new twelve-month probationary period when he began his Worker's Compensation position and when it extended his probation by 200 hours. To the extent that the Appellant is seeking to obtain review of those decisions as separate personnel transactions, the Commission also lacks the authority to conduct that review. Appellant would not be able to satisfy the Sec. 230.44(3), Stats., 30-day filing period for civil service appeals even if his January 3, 2004, letter of appeal is construed as an appeal of Respondent's November 8, 2002 establishment of a new twelve-month probationary period or of Respondent's October 24, 2003 action to extend Appellant's probation.

#### Other matters

The Appellant requested that the Commission not consider the Respondent's reply brief because it was received by the Commission on April 1, 2004, even though the briefing schedule established a due date of March 31, 2004. There is no indication from the Appellant that he was adversely affected by the one day delay in the Commission's receipt of the brief and there were no adverse consequences on the Commission's ability to rule on the Respondent's motion to dismiss for lack of subject matter jurisdiction. Respondent did not gain any advantage by the delay. Under these circumstances, the Commission has exercised its discretion under PC 1.09, Wis. Adm. Code, and considered the Respondent's reply brief. ORIEDO V. DPI, 98-0042-PC-ER, 6/2/99 (the Personnel Commission rejected the complainant's objection and considered a brief that was filed a day late); MUELLER V. DOT & DER, 93-0109-PC, 2/27/97 (the Personnel Commission denied the respondent's motion to dismiss for a failure to timely file a post-hearing brief where the brief was filed one day late but was timely served on the appellant). At Appellant's request, the Commission has also considered the "rebuttal comments" he filed on April 2, 2004.

In his submission dated April 2, 2004, the Appellant also requested the opportunity to “orally address the Commission regarding this matter.” The Commission has the discretion to determine that “an issue or question is better addressed by oral argument rather than written argument.” PC 5.06(2), Wis. Admin. Code. In the present case, both parties have already submitted two briefs on the jurisdictional issue. The Appellant has asked that the Commission render its decision on Respondent’s motion “as soon as possible” but scheduling an oral argument at a time that is convenient to the Commission and both parties would delay the Commission’s decision. The Commission is also satisfied that the underlying issue is not one that is better addressed through oral rather than written argument. Given these circumstances, the Commission denies the Appellant’s request.

Dated at Madison, Wisconsin, this 1st day of June, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

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Judith Neumann, Chair

Paul Gordon /s/

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Paul Gordon, Commissioner

Susan J. M. Bauman /s/

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Susan J. M. Bauman, Commissioner

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