

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ROBERT F. ZEIDEL, Appellant,

v.

President, UNIVERSITY OF WISCONSIN SYSTEM, Respondent.

Case 7
No. 63513
PA(grp)-1

Decision No. 31038

Appearances:

Robert F. Zeidel, PO Box 145, Afton, MN 55001, appearing on his own behalf.

Anne E. Bilder, System Legal Counsel, University of Wisconsin System, 1852 Van Hise Hall, 1220 Linden Drive, Madison, WI 53706, appearing on behalf of Respondent.

**RULING ON MOTION TO DISMISS FOR LACK OF
SUBJECT MATTER JURISDICTION AND AS UNTIMELY FILED**

This matter is before the Wisconsin Employment Relations Commission (the Commission) on Respondent's motion to dismiss the appeal for lack of subject matter jurisdiction and as untimely filed. The appeal arises from a decision not to select the Appellant for a vacant faculty position at the University of Wisconsin-Stout (UW-Stout). The parties have filed written arguments, the last of which was received on June 23, 2004.

For the reasons set forth below, the Commission grants the Respondent's motion and dismisses the appeal.

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

Dec. No. 31038

FINDINGS OF FACT

1. At all times relevant to this appeal, the Appellant has been employed by UW-Stout in an academic staff position.

2. Appellant applied for a tenure-track faculty position in the Social Science Department at UW-Stout late in 2002. He was informed in March of 2003 that he had not been chosen for the position.

3. Appellant contends that his application for the position was either not considered or was not fairly considered.

4. He raised his concerns with the institution's Affirmative Action Officer who concluded, in a letter dated October 30, 2003, that the "search committee followed the equal opportunity process and no intent or actual discrimination was found."

5. In a letter to the institution's Human Resources Director, Wayne Argo, in December of 2003, the Appellant requested "review by a faculty Positive Action Committee" of the selection decision. In the spring of 2004, according to the Appellant, Mr. Argo "stated that I had exhausted all on-campus avenues, and that I should take my case to the Wisconsin Employment Relations Commission."

6. Appellant filed a letter with the Commission on March 29, 2004, in which he wrote, in part:

As a non-represented state employee, Academic Staff at the University of Wisconsin-Stout, I herewith submit a grievance pursuant to my treatment during a recent University recruitment and hire.

The Appellant has also filed a complaint regarding the same personnel transaction with the Equal Rights Division of the Department of Workforce Development.

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

CONCLUSIONS OF LAW

1. Appellant has the burden to establish that the Commission has subject matter jurisdiction over his appeal. *LAWRY V. DP, 79-26-PC, 7/31/79.*

2. Appellant has failed to sustain his burden.

3. The Commission lacks subject matter jurisdiction over this matter.

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 11th day of August, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

University of Wisconsin System (Zeidel)

MEMORANDUM ACCOMPANYING RULING ON MOTION TO DISMISS

The Appellant characterizes his request for the Commission to review UW-Stout's selection decision for a tenure-track faculty position in March of 2003 as a "grievance" from a "non-represented state employee."

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

The Director of OSER has established the scope of the grievance procedure in Ch. ER 46, WIS. ADM. CODE. In order to have access to the non-contractual grievance procedure, the grievant must fall within the definition of "employee" found in Sec. ER 46.02(2), which is limited to "a state employee in the classified civil service under s. 230.08(3), Stats." Pursuant to Sec. 230.08(2)(d), Stats., "[a]ll faculty and academic staff, as defined in s. 36.05(1) and (8), in the University of Wisconsin System" are part of the unclassified, rather than the classified, service. It is undisputed that the Appellant is currently employed in an academic staff position. Therefore, he does not have access to the non-contractual grievance procedure and the Commission lacks subject matter jurisdiction under Sec. 230.45(1)(c), Stats. 1/

1/ The particular transaction in question is also squarely encompassed by the "management rights" exception to the non-contractual grievance process because it relates to "hiring, promoting, transferring, assigning or retaining employees" as provided in Sec. ER 46.04(2)(d), WIS. ADM. CODE.

None of the other sources of the Commission's jurisdiction over State civil service personnel actions includes the authority to review a UW faculty hiring decision. While the Commission does have the authority under Sec. 230.44(1)(d), Stats., to review certain hiring decisions, this provision is limited to the hiring process "in the classified service." As has been previously noted, UW faculty positions are part of the unclassified, rather than classified, service.

For the reasons set forth above, this matter must be dismissed because the Commission lacks the authority to review it as an appeal under Sec. 230.44 and .45, Stats. The Commission does not reach the Respondent's timeliness objection to the appeal. However, the

Commission notes that the period for filing a non-contractual grievance at the first step is “30 calendar days from the date the employee first became aware or should have become aware of the matter grieved.” Sec. ER 46.06(1), WIS. ADM. CODE. The period for filing a non-contractual grievance at the final step is “30 calendar days after service of a decision issued at the third step of the grievance procedure under s. ER 46.04(2)(c)2., or within 30 calendar days after the last day on which the employer could have served a timely decision, whichever is sooner.” Sec. ER 46.07(2), WIS. ADM. CODE. There is no evidence to suggest that the Appellant filed non-contractual grievances at the first, second or third step. The period for filing an appeal of a non-selection decision is “30 days after the effective date of the action, or within 30 days after the appellant is notified of the action, whichever is later. . . .” Sec. 230.44(3), Stats. The effective date of the non-selection decision was no later than the date the Appellant was notified of the decision. UNIVERSITY OF WISCONSIN (ELMER), DEC. NO. 30910, 5/04. The filing of a contractual grievance does not toll the 30-day filing period in Sec. 230.44(3), Stats., (UNIVERSITY OF WISCONSIN & DIVISION OF MERIT RECRUITMENT AND SELECTION, DEC. NO. 30890, 4/04) so Appellant’s efforts to have Respondent review the matter internally would also, at least typically, have no effect. BACHMAN V. UW-MADISON, 85-0111-PC, 11/85.

Dated at Madison, Wisconsin, this 11th day of August, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

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