

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 41

MILWAUKEE COUNTY

MATTHEW D. KRISKA,

Petitioner,

Case No. 06-CV-9545

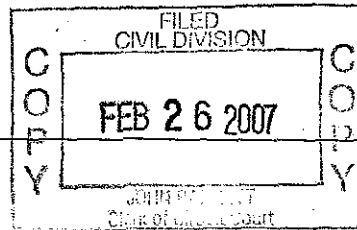
v.

Case Code 30607

STATE OF WISCONSIN – WISCONSIN
EMPLOYMENT RELATIONS COMMISSION,

Decision No. 31796

Defendant.



DECISION

Petitioner Matthew D. Kriska (“Kriska”) filed a petition for review of a decision by the Wisconsin Employment Relations Commission (“WERC”) that dismissed a personnel appeal that he had filed with the Wisconsin Department of Corrections (“the DOC”). For the reasoning outlined below, the decision of the WERC is **AFFIRMED**.

BACKGROUND

Kriska was hired by the DOC as a correctional officer in July of 1995. In November of 2001, he was promoted to the position of “Supervising Officer 1.” In November of 2005, Kriska was once again promoted, this time to the position of “Supervising Officer 2.”

Following his promotion to Supervising Officer 2, but during his probationary period, Kriska was demoted back to Supervising Officer 1 after a co-worker alleged that he had made some inappropriate sexual comments. Kriska first learned of the allegations at a January 27, 2006 meeting. At that time, he denied making certain specific comments, but did admit that he may have told an inappropriate joke.

On February 16, 2006, Kriska appeared at a pre-disciplinary interview for alleged violations of workplace rules. Kriska alleges that he was not advised of the nature of the rules violations, nor what type of discipline was being considered by his superiors any time before that interview.

Kriska heard nothing more of the matter until March 16, 2006, when he was informed by letter that his promotional probation was being terminated for violations of work rules numbers seven (7) and thirteen (13). As a result, Kriska restored to the position of Supervising Officer 1. A meeting was scheduled for March 22, 2006 so that the parties involved could discuss the changes outlined in the letter. At the meeting, Kriska allegedly learned that the inappropriate comments were "90% of the reason" for the demotion. The demotion took effect on March 26, 2006.

Kriska filed a Personnel Appeal with the WERC on April 14, 2006. The WERC dismissed the appeal on September 6, 2006 after determining that it did not have subject-matter jurisdiction under Wis. Stat. § 230.44(1)(c). Kriska filed a Petition for Review with this Court, seeking to have the matter remanded to the WERC for a decision on the merits.

DISCUSSION

Kriska alleges that the WERC incorrectly determined that it did not have jurisdiction under § 230.44(1)(c). An agency decision involving the scope of the agency's own power is not binding on this Court. Board of Regents of the University of Wisconsin v. Wisconsin Personnel Commission, 103 Wis.2d 545, 551 (1981).

Section 230.44(1)(c) reads in pertinent part as follows:

- (1) **Appealable actions and steps.** Except as provided in par. (e), the following are actions appealable to the commission under s. 230.45 (1) (a):

(c) *Demotion, layoff, suspension or discharge.* If an employee has permanent status in class, or an employee has served with the state as an assistant district attorney for a continuous period of 12 months or more, 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 (emphasis added).

The WERC declined jurisdiction of the matter as it did not believe that Kriska had obtained "permanent status in class" in his position of Supervising Officer 2. Wis. Admin Code § ER MRS 1.02(23) provides that "permanent status in class" exists when an employee has successfully completed "a probationary period or career executive trial period required upon an appointment to permanent, seasonal or sessional employment." In its decision, the WERC concluded that the DOC had not interfered with what was Kriska's permanent status in class as a Supervising Officer 1.

WERC finds support for the conclusion that it is without jurisdiction in both the Wisconsin Statutes and the Wisconsin Administrative Code, respectively:

230.28 Probationary period.

(a) All original and all promotional appointments to permanent, sessional and seasonal positions, with the exception of those positions designated as supervisor or management under s. 111.81, in the classified service shall be for a probationary period of 6 months . . . Dismissal may be made at any time during such periods. . .

ER-MRS 14.03 Kinds of promotion; status and rights.

(1) P ROMOTION WITHIN THE SAME AGENCY. In accordance with s. 230.28 (1), Stats., the promoted employee shall be required to serve a probationary period. At any time during this period the appointing authority may remove the employee from the position to which the employee was promoted without the right of appeal and shall restore the employee to the employee's former position or a similar position and former rate of pay, as determined under s. ER 29.03 (7) (a), or the compensation plan. Any other removal, suspension without pay, or discharge during the probationary period shall be subject to s. 230.44 (1) (c) , Stats.

Looking at the language above, it would seem that the WERC was correct in its refusal to exercise jurisdiction in the case. However, Kriska contends that Wisconsin cases that have discussed factually similar cases command that the WERC take up the merits of his appeal. The WERC disagrees with Kriska's interpretation of these cases.

In Department of Health and Social Services v. State Personnel Board, 84 Wis.2d 675 (1978), a Mr. Ferguson was had obtained permanent status in class in his position with the University of Wisconsin. 84 Wis.2d at 679. He was later awarded a promotion to a position with the Department of Health and Social Services ("DHSS"). Id. Before his probationary period had expired, he was terminated. Id. Ferguson appealed his termination to the Personnel Review Board ("the PRB") and prevailed on his argument that he had been terminated without just cause. Id. at 679-80.

The Supreme Court of Wisconsin took up the issue of whether the PRB had jurisdiction to consider Ferguson's appeal. It ultimately concluded that the PRB lacked subject-matter jurisdiction as Ferguson had not obtained permanent status in class in his new position with the DHSS. Id. at 682.

Ferguson argued that he had obtained permanent status in class in his pre-promotion position and should have been reinstated to that position, rather than being completely terminated from state service. Id. The Supreme Court disagreed, pointing out the statutorily created difference between an *interdepartmental* promotion and an *intradepartmental* promotion. Id. According to the Court, this distinction was created by §16.22(1)(d) [renumbered § 230.28(1)(d)] which stated that "A promotion or other change in job status within a department shall not affect the permanent status in class and rights, previously acquired by an employee within such an agency." Id. at 680-81.

The Court interpreted this language to mean that if an employee is dismissed during the probationary period of his or her new position *within the same department*, there is no effect on permanent status in class with respect to his or her old position. However, if an employee is dismissed during the probationary period of his or her new position *in a new department*, he or she may be dismissed from the classified service all together. 84 Wis.2d at 681.

Kriska relies heavily on Arneson v. Jezwinski, 225 Wis.2d 371 (1999) to support his contention that he is entitled to decision from the WERC on just cause for the discipline imposed in his case. Arneson was a University of Wisconsin employee who was promoted within his department after approximately nine years of service. 225 Wis.2d at 375-76. While serving out the probationary period of his new position, a subordinate employee filed a sexual harassment complaint against him. Id. As a result of the allegations, Arneson was suspended for thirty days without pay, and was demoted to a position that was below the position that he had held prior to his promotion. Id. at 378.

The Personnel Commission accepted jurisdiction and decided that Arneson was entitled to a pre-disciplinary hearing. Thus, the University was ordered to reverse its disciplinary decision and restore Arneson to the position that he held at the time that the discipline was imposed. Id. at 379. Neither party appealed the Personnel Commission's decision, but Arneson later filed a 42 U.S.C. § 1983 claim against his supervisors for their alleged violation of his constitutional right to due process. Id. at 380. The issue presented to the Supreme Court was whether qualified immunity barred Arneson's claim that the imposition of excessive discipline violated his right to due process. Id. at 381.

Kriska argues that the following language supports his position that the WERC should have engaged in a review of the just cause for his demotion:

When Arneson was promoted within [the University] he had already acquired permanent status in class and rights [in his previous position] and therefore he retained his permanent status pursuant to the dictates of Wis. Stat. § 230.28(1)(d). and as an employee with permanent status in class, the defendants were required to abide by Wis. Stat. § 230.34(1)(a) when they discipline him, just as they would have been required to do when disciplining any other permanent status employee.

255 Wis.2d at 395.

However, Kriska fails to take into account the factual distinctions between this case and the Arneson. In Arneson, the Supreme Court found that Arneson had a constitutionally-protected property interest in his pre-promotion position, in which he had obtained permanent status in class. Id. at 393. The discipline imposed put Arneson in a worse position than he was in before the promotion. The conclusion drawn by the Court was that any discipline affecting Arneson's permanent status in class *in his previous position* could be maintained only for just cause, as required in § 230.34(1)(a).

In the case at bar, Kriska had achieved permanent status in class in the position of Supervising Officer 1. Wis. Stat. § 230.28(1)(d). The discipline imposed for the alleged sexual harassment did not affect his rights as they are related to this position. Arneson is inapplicable to these facts.

Finally, Kriska argues that the WERC interpretation deprives him of constitutionally protected rights. Specifically, Kriska maintains that he was entitled to a "just cause" review of the discipline imposed.


However, Arneson supports the WERC's refusal to accept jurisdiction. As stated above, the Court ruled that Arneson's protected interests only related to his pre-promotion position. Kriska was restored to his pre-promotion position, without suffering any further discipline. As such, the WERC was not required to hold a hearing on the merits of the DOC's actions.

CONCLUSION

For the reasons stated, the decision of the WERC is AFFIRMED.

Dated this 26 day of February, 2007.

BY THE COURT:


HONORABLE JOHN J. DIMOTTO
CIRCUIT COURT, BRANCH 41