

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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**LESTER PASCH**, Appellant,

v.

**Secretary, WISCONSIN DEPARTMENT OF HEALTH  
AND FAMILY SERVICES**, Respondent.

Case 17  
No. 65783  
PA(adv)-97

**Decision No. 31798**

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**Appearances:**

**Lester Pasch**, appearing on his own behalf.

**Paul Harris**, Attorney, Department of Health and Family Services, PO Box 7850, Madison, WI 53707-7850, appearing on behalf of Respondent.

**ORDER DISMISSING APPEAL FOR LACK OF SUBJECT MATTER JURISDICTION**

This matter is before the Wisconsin Employment Relations Commission on the Respondent's motion to dismiss the appeal for lack of subject matter jurisdiction and as untimely filed. The last date for the parties to submit written argument on the motion was June 2, 2006.

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

**FINDINGS OF FACT**

1. Appellant commenced employment on August 28, 2005 as a Psychiatric Care Supervisor at the Sand Ridge Secure Treatment Center that is operated by Respondent. Appellant was required to complete a 12-month probationary period.

2. On February 27, 2006, Respondent terminated Appellant's probationary employment as a Psychiatric Care Supervisor and restored him to a Psychiatric Care Technician position on February 28.

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3. On April 3, 2006, Appellant filed a letter of appeal with the Commission, seeking reinstatement as a Psychiatric Care Supervisor as well as back pay and other relief.

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

**CONCLUSION OF LAW**

The Commission lacks subject matter jurisdiction over this matter as an appeal filed under sec. 230.44 or .45, Stats.

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

**ORDER**<sup>1</sup>

This matter is dismissed for lack of subject matter jurisdiction as an appeal filed under Sec. 230.44 or .45, Stats.

Given under our hands and seal at the City of Madison, Wisconsin, this 6<sup>th</sup> day of September, 2006.

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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<sup>1</sup> Upon the issuance of this Order, the accompanying letter of transmittal will contain the names and addresses of the parties to this proceeding and notices to the parties concerning their rehearing and judicial review rights. The contents of that letter are hereby incorporated by reference as a part of this Order.

Department of Health and Family Services (Pasch)

MEMORANDUM ACCOMPANYING ORDER DISMISSING APPEAL

This matter, arising from a probationary termination decision, was presumably filed as an appeal pursuant to sec. 230.44(1)(c), Stats. That paragraph provides:

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.

Pursuant to the decision of the Court of Appeals in BOARD OF REGENTS V. WISCONSIN PERSONNEL COMMISSION, 103 WIS.2D 545, 309 N.W.2D 366 (1981), this agency, as the successor agency to the Personnel Commission for appeals filed under Sec. 230.44, Stats., lacks subject matter jurisdiction over appeals of probationary termination decision where the employee is serving an initial probationary period and, therefore, lacks the “permanent status in class” required in Sec. 230.44(1)(c), Stats.

The Commission has held that BOARD OF REGENTS remains applicable and that there is no other jurisdictional basis in Sec. 230.44 and .45, Stats., that is even arguably relevant to the review of a probationary termination or discharge filed with this agency. DEPARTMENT OF CORRECTIONS (GOINS), DEC. NO. 30766 (1/04); DEPARTMENT OF WORKFORCE DEVELOPMENT (STERN), DEC. NO. 30912 (6/04).

In this case, Respondent terminated Appellant’s status as a Psychiatric Care Supervisor before he obtained permanent status in that classification but continued his employment after restoring him to a Psychiatric Care Technician position. Probationary periods are required for all original appointments as well as all promotional appointments. Sec. ER-MRS 13.03, Wis. Adm. Code. As noted in Sec. ER-MRS 13.08(1), the “appointing authority may dismiss any employee without the right of appeal during the employee’s probationary period.” The action by DHFS related solely to Appellant’s probationary status but it did not interfere with his permanent status in the Psychiatric Care Technician classification and therefore was not a discharge that could be reviewed by the Commission pursuant to Sec. 230.44(1)(c). The distinction is clarified by Sec. ER-MRS 14.03(1):

[T]he 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 . . . . Any *other* removal, suspension without pay, or discharge during the probationary period shall be subject to s. 230.44(1)(c), Stats. (Emphasis added.)

Appellant was restored to his former position and there is no indication that the probationary dismissal was accompanied by a suspension or discharge. Therefore, the Commission lacks jurisdiction to review the action.<sup>2</sup>

The Commission notes that Mr. Pasch appears to have filed a complaint of discrimination/retaliation with the Equal Rights Division (ERD) of the Department of Workforce Development. The fact that ERD may be conducting an investigation in the case before that agency is immaterial to the present case. The Commission's Order dismissing this matter has no effect on that claim or any claim Mr. Pasch might file with the Commission under the State Employment Labor Relations Act as referenced in Sec. 111.84.

Because the Commission lacks the authority to hear this matter as an appeal under Sec. 230.44 or .45, it must be dismissed.

Dated at Madison, Wisconsin, this 6<sup>th</sup> day of September, 2006.

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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<sup>2</sup> A more thorough analysis of the same jurisdictional issue is reflected in the Commission's ruling being issued in DOC (KRISKA), DEC. NO. 31796, WERC, (9/2006).