

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MATTHEW D. KRISKA, Appellant,

v.

Secretary, WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent

Case 54
No. 65988
PA(grp)-4

Decision No. 31957

Appearances:

JoAnne M. Breese-Jaeck and **Anthony P. Hahn**, Hostak, Henzl & Bichler, S.C., 840 Lake Avenue, P.O. Box 516, Racine, WI 53401, appearing on behalf of Matthew D. Krisak.

Kathryn R. Anderson, Assistant Legal Counsel, P. O. Box 7925, Madison, WI 53707-7925, appearing on behalf of the Department of Corrections.

ORDER GRANTING MOTION TO DISMISS

This matter, which was submitted to the Wisconsin Employment Relations Commission (the Commission) at the final step in the non-contractual grievance procedure, is before us on Respondent's motion to dismiss the matter for lack of subject matter jurisdiction and on timeliness grounds. The final submission relating to the motion was filed on December 12, 2006.

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

FINDINGS OF FACT

1. In 2002, Matthew Kriska obtained permanent status in class as a Supervising Officer 1 (Lieutenant). He was promoted to a position as Supervising Officer 2 (Captain) at the Milwaukee Secure Detention Facility in November 2005 and was required to complete a 6-month probationary period.

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2. In January 2006, allegations were made that Mr. Kriska had engaged in improper conduct while working.

3. Respondent conducted an investigation of the allegations but did not provide Appellant with the investigative findings. Respondent issued him a memo, which he received on February 14, 2006, that required him to participate in a pre-disciplinary interview on February 16 for alleged violations of Work Rules 7 and 13. The February 16 meeting took place as scheduled.

4. The warden of the facility, John Husz, issued a letter that was delivered to Appellant on March 16, 2006 that read, in part:

This is to inform you of our intention to end your promotional probation period as a Supervising Officer 2 with the Division of Adult Institution, Milwaukee Secure Detention Facility due to your failure to meet probationary standards. This is due to violation of the following DOC Work Rules:

- Work Rule #7 which states, "Making false, inaccurate or malicious statements about employees, inmates, offenders or the Department."
- Work Rule #13 which states, "Intimidating, interfering with, harassing, (including sexual or racial harassment), demeaning, or using abusive language in dealing with others."

This action is taken pursuant to S. ER-MRS 13.08, Wisconsin Administrative Code, and in accordance with s. 230.28, Wisconsin State Statutes, which provides that you be informed of the reason to remove you from the position during your . . . promotional probationary period.

You are afforded the opportunity to respond to the reasons for your removal at a meeting, which has been scheduled for Wednesday, March 22 If you fail to appear at the meeting, I will assume you do not wish to meet and your promotional probation . . . will end effective March 25, 2006.

In accordance with ER-MRS 14.03, upon your removal you will be restored to a Supervising Officer 1 position at Milwaukee Secure Detention Facility effective March 26, 2006.

5. Warden Husz subsequently issued a letter that was delivered to the Appellant on March 24, 2006 which read, in part:

The decision to remove you from your position as a Supervising Officer 2 . . . effective March 25, 2006, is justified in my judgment. . . .

Pursuant to s. ER-MRS 14.03, Wisconsin Administrative Code, you shall be restored to a Supervising Officer 1 position at the Milwaukee Secure Detention Facility effective March 26, 2006. This action is without the right of appeal.

6. Appellant subsequently took various steps to invoke the grievance procedure that applies to Respondent's employees who are not covered by a collective bargaining agreement.

7. On June 14, 2006, Appellant filed a claim¹ with the Commission, contending that the "Department of Corrections has abused its discretion in its misapplication and violation of applicable rules, procedures and laws, including, but not limited to 230.34(1), Wis. Stats., and Wisconsin Department of Corrections Supervisor's Manual Chapter 403 (D), in demoting/terminating the probation of Mr. Kriska in the absence of a just cause determination and corresponding denial of due process and deprivation of liberty interests." The June 14 claim asserted that the Commission had subject matter jurisdiction over the matter pursuant to Sec. 230.45(1)(c), Stats., as the final step in the grievance procedure for non-represented State employees.

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 that there is subject matter jurisdiction over his appeal and that it was timely filed.
2. The Appellant has failed to satisfy his burden.
3. The Commission lacks subject matter jurisdiction over this matter.

¹ Mr. Kriska filed a separate claim with the Commission as a direct appeal of the termination. That matter was dismissed by the Commission on September 6, 2006 for lack of subject matter jurisdiction. DOC (KRISKA) DEC. No. 31796 (WERC, 9/2006). The Appellant filed a petition for judicial review and the matter is pending. KRISKA V. WERC, MILWAUKEE COUNTY CIRCUIT COURT, 06CV009545.

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

ORDER²

Respondent's motion is granted and this matter is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 15th day of December, 2006.

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

² Upon 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.

Wisconsin Department of Corrections (Kriska)

MEMORANDUM ACCOMPANYING ORDER GRANTING MOTION TO DISMISS

Respondent has raised two objections to Mr. Kriska's 4th step grievance, one based on timeliness and the other on subject matter jurisdiction.

Jurisdiction

Respondent characterizes the subject of the grievance as the action of terminating Appellant's promotional probation as a Captain and restoring him to a position as a Lieutenant. According to the Respondent, the termination decision was a "management right" because it was a decision not to "retain" Appellant in his Captain position and that as a management right, the subject is excluded from the non-contractual grievance procedures.

Section 230.04(14), Stats., provides that "[t]he director [of the Office of State Employment Relations] shall establish, by rule, the scope and minimum requirements of a state employee grievance procedure relating to conditions of employment."³ Section ER 46.03(2) lists specific non-grievable issues, which include "a condition of employment which is a right of the employer as defined in s. ER 46.04."⁴ The scope of the management rights exclusion from the grievance process is established by ER 46.04(2):

For the purpose of this chapter, the management rights of the employer include, but are not limited to, the following:

- (a) Utilizing personnel, methods and means to carry out the statutory mandate and goals of the agency.
- (b) Determining the size and composition of the work force.
- (c) Managing and directing the employees of the agency.
- (d) Hiring, promoting, transferring, assigning or retaining employees.
- (e) Establishing reasonable work rules.
- (f) Taking disciplinary action for just cause against an employee.
- (g) Laying off employees due to lack of work or funds or organizational changes.

³ As provided in Sec. 230.45(1)(c), Stats., the Commission shall "[s]erve as final step arbiter in the state employee grievance procedure established under s. 230.04(14)."

⁴ Section ER 46.03(2)(j).

While the Respondent characterizes the subject of the grievance as the termination decision, i.e. the decision not to retain him in the Captain position, Mr. Kriska contends that it is something more. According to the Appellant, the subject of his grievance is whether Respondent terminated his probation and restored him to a Lieutenant position without making a just cause or due process determination that he contends is required by the terms of the applicable supervisor's manual.⁵ The manual provides, in part:

D. Probationary and Project Employees

Employees serving an original probationary period should demonstrate the ability to respond to ongoing supervision and counseling, including verbal warnings. A work rule violation that would result in a written reprimand or suspension without pay if committed by a permanent employee may therefore result in termination of an employee serving an original probationary period.

Employees serving a permissive or promotional probationary period are subject to the disciplinary process for violations of work rules not arising from the inability to perform job duties. Violations should be handled in the same manner as a rule violation by an employee with permanent status in class in the classification. However, if an employee on permissive or promotional probation, after appropriate instruction and training, experiences job-performance problems that indicate a lack of ability to perform at an acceptable level, the probation should be terminated.

Elsewhere, the manual identifies three steps in the disciplinary process: “[1] Management Investigates to Establish the Facts and Determine Just Cause [; 2] Management Presents the Findings of the Investigation in a “Due-Process” Pre-Disciplinary Hearing [; and 3] Management Selects and Administers Appropriate Disciplinary Action.

Appellant suggests that the questions about his conduct did not arise from an inability to perform job duties. Because he was serving a promotional probationary period, Appellant argues, the manual therefore requires those alleged work rule violations by the Appellant to be “handled in the same manner as a rule violation by an employee with permanent status in class in the classification.” Appellant appears to argue that the “same manner” refers to the pre-disciplinary process and the nature of the discipline imposed, and that because Respondent's action had not been based on job-performance problems indicative of “a lack of ability to perform at an acceptable level,” the employer could not terminate his promotional probation.

⁵ Irrespective of the reference in 46.04(2)(d) to “retaining” employees, par. (f) specifically prohibits a non-contractual grievance of a “disciplinary action.” Even if the Respondent's action could be described as a “disciplinary action,” Appellant could not grieve it.

Although Mr. Kriska asserts that his claim relates to a question that can be distinguished from Respondent's decision not to retain him as a Captain, he is clearly attempting to overturn that decision. He is attempting to bootstrap a review of the termination itself to his specific arguments relating to how Respondent reached the termination decision, i.e. that Respondent failed to comply with its internal procedures; and Respondent failed to provide him due process. He is unable to show how the Commission would have the authority to review the process question and grant him the relief he seeks if we lack the authority to review the underlying non-retention action and consequently lack the authority to overturn the probationary termination. Despite Appellant's statement that there is a distinction between this case and a 230.45(1)(c) grievance that is merely an effort to obtain review of a probationary termination, there is no real difference. Appellant is asking the Commission to overturn a probationary termination decision even though such actions are specifically excepted from the grievance procedure by ER 46.04(2). The Commission cannot reach a procedural due process question or a contention that there was an abuse of discretion in reaching a decision unless it has jurisdiction over the underlying transaction.

Timeliness

Because the Commission finds that it lacks the authority to hear this appeal, we do not reach DOC's timeliness objection.

In light of the absence of subject matter jurisdiction, this appeal must be dismissed.

Dated at Madison, Wisconsin, this 15th day of December, 2006.

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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