

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

GARY G. STRAUSS, Appellant,

v.

Secretary, **DEPARTMENT OF NATURAL RESOURCES**, Respondent.

Case 8
No. 66501
PA(adv)-110

Decision No. 32024

Appearances:

Gary G. Strauss, appearing on his own behalf.

Daniel Graff, Attorney, Department of Natural Resources, PO Box 7921, Madison, Wisconsin 53707-7921, appearing on behalf of Respondent.

ORDER DISMISSING APPEAL
FOR LACK OF SUBJECT MATTER JURISDICTION

This matter is before the Wisconsin Employment Relations Commission (the Commission). On December 19, 2006, the Respondent filed a motion to dismiss the appeal for lack of subject matter jurisdiction. The last submission relating to the motion was received on February 6, 2007.

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

FINDINGS OF FACT

1. Appellant was employed by the Department of Corrections as a Maintenance Mechanic from February 12, 2001 to August 9, 2004 and gained permanent status as a Maintenance Mechanic 3.

2. By letter dated August 6, 2004, the Department of Corrections discharged Appellant from his employment as a Maintenance Mechanic 3 due to violation of various work rules.

3. Appellant was hired as a Maintenance Mechanic 3 by the University of Wisconsin System, effective June 29, 2005. According to the appointment letter:

Dec. No. 32024

Your seniority date with the State of Wisconsin will be adjusted to January 2, 2002. Since this is a reinstatement to a different employing unit from which you terminated, you will be required to serve a 6-month permissive probationary period.

4. By letter dated August 29, 2005, the University of Wisconsin System terminated Appellant's employment effective August 26, 2005 "for failure to meet probationary standards for the position." The letter went on to state: "You will retain reinstatement eligibility until August 26, 2010."

5. As a consequence of taking a civil service examination, Appellant was appointed to a position at DNR's High Cliff State Park as a Facilities Maintenance Specialist-Advanced, effective July 10, 2006. The letter of appointment included the following: "As required by Wisconsin Statute, you are required to serve a 6 month probationary period in this new assignment."

6. Effective November 15, 2006, Respondent terminated the Appellant's employment as a Facilities Maintenance Specialist-Advanced. The termination occurred within the 6-month probationary period. The letter read, in part:

The resume you provided to the interview panel reflects your employment as a Maintenance Mechanic/Supervisor for a Department of Corrections correctional center from 2001 to 2005.

The "Personal History Record" you completed when you began employment identifies State of Wisconsin employment from February 2001 to August 2005 at UW Fond du Lac and Sanger Powers.

When your employment began with the Department of Natural Resources, your official personnel file was forwarded to our department. This official personnel file clearly reflects that your employment was ended with the Department of Corrections on August 9, 2004. In addition, you were employed by UW-Fond du Lac from Jun 29, 2005 to August 26, 2005.

Because you failed to be honest in your employment history not only on your resume, but also after your employment with our department, we have determined it is appropriate to end your employment during your probationary period.

7. By letter dated November 28, 2006, Appellant filed an appeal of the termination with the WERC.

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

ORDER¹

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 22nd day of February, 2007

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

Chairperson Judith Neumann did not participate.

¹ 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.

Department of Natural Resources (Strauss)

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).

Appellant argues that he was “reinstated” when DNR hired him in July 2006, and because he was serving a permissive (rather than mandatory) probationary period at the time DNR terminated his employment as a Facilities Maintenance Specialist-Advanced, “different rules apply” and the Commission has the authority to review the personnel action. Respondent takes the position that the Appellant was on “original” probation as of the termination date because he had no reinstatement eligibility arising from his previous employment with the Department of Corrections as a Maintenance Mechanic 3.² Irrespective of whether Appellant’s or Respondent’s version of events is more accurate, there is no dispute that Appellant was serving a probationary period as a Facilities Maintenance Specialist-Advanced at the time his employment was terminated. As provided in Sec. ER-MRS 13.08, Wis. Adm. Code, the “appointing authority may dismiss any employee without the right of appeal during the employee’s probationary period.” The Commission lacks subject matter jurisdiction over this appeal because Appellant was serving a probationary period at the time of his termination and

² Respondent correctly points out that reinstatement eligibility is only generated when the employee “has separated from a position in the classified service without misconduct or delinquency.” Sec. ER-MRS 16.035, Wis. Adm. Code. Appellant’s separation from service in 2004 was for misconduct, so he had no reinstatement eligibility arising from his DOC employment. He never attained permanent status during his employment with the University of Wisconsin System in 2005 and his separation in that year was also for misconduct.

consequently lacked permanent status in the Facilities Maintenance Specialist-Advanced classification. He does not have the prerequisite status to invoke the Commission's authority under Sec. 230.44(1)(c).

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

Dated at Madison, Wisconsin, this 22nd day of February, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

Chairperson Judith Neumann did not participate.